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EDITOR'S NOTE

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No. 86-5020-CSY  
Status: GRANTED  
CAPITAL CASE

Title: John Booth, Petitioner  
v.  
Maryland

Docketed:  
July 7, 1986

Court: Court of Appeals of Maryland

Counsel for petitioner: Burns Jr., George E.

Counsel for respondent: Cloutier, Valerie V.

Entry	Date	Note	Proceedings and Orders
1	Jul 7 1986	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Jul 29 1986		Order extending time to file response to petition until September 5, 1986.
5	Sep 5 1986		Brief of respondent Maryland in opposition filed.
6	Sep 11 1986		DISTRIBUTED. September 29, 1986
8	Oct 3 1986		REDISTRIBUTED. October 10, 1986
10	Oct 14 1986		Petition GRANTED. limited to Question 3 presented by the petition. *****
11	Nov 13 1986		Record filed.
12	Nov 13 1986		Certified original record, 6 volumes, received.
14	Nov 18 1986		Order extending time to file brief of petitioner on the merits until December 6, 1986.
15	Dec 2 1986		Brief of petitioner John Booth filed.
16	Dec 4 1986		Joint appendix filed.
17	Dec 6 1986		Brief amicus curiae of NAACP Legal Defense and Educational Fund filed.
19	Dec 24 1986		Order extending time to file brief of respondent on the merits until January 26, 1987.
20	Jan 26 1987		Brief of respondent Maryland filed.
21	Feb 6 1987		CIRCULATED.
22	Feb 5 1987	G	Motion of Stephanie Roper Foundation, Inc. for leave to file a brief as amicus curiae, out-of-time, filed.
23	Feb 6 1987		SET FOR ARGUMENT. Tuesday, March 24, 1987. (4th case)
24	Feb 23 1987		Motion of Stephanie Roper Foundation, Inc. for leave to file a brief as amicus curiae, out-of-time, GRANTED.
25	Feb 18 1987	D	Motion of Sunny Von Bulow National Victim Advocacy Center, Inc., et al. for leave to file a brief as amici curiae, out-of-time, filed.
26	Mar 9 1987		Motion of Sunny Von Bulow National Victim Advocacy Center, Inc., et al. for leave to file a brief as amici curiae, out-of-time, DENIED.
27	Mar 24 1987		ARGUED.



**PETITION  
FOR WRIT OF  
CERTIORARI**

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN BOOTH,  
Petitioner,

v.

STATE OF MARYLAND,  
Respondent

ON WRIT OF CERTIORARI  
TO THE COURT OF APPEALS OF MARYLAND

MOTION FOR LEAVE TO PROCEED  
IN FORMA PAUPERIS

The Petitioner, John Booth, who is indigent and who  
has been found to meet the qualifications for representation  
by the Office of the Public Defender for the State of  
Maryland, asks leave to file the attached Petition for Writ  
of Certiorari to the Court of Appeals of Maryland without  
prepayment of costs and to proceed in forma pauperis  
pursuant to Rule 46.

The Petitioner's affidavit in support of this  
Petition is attached hereto.

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No. **86-5020**

IN THE  
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STATE OF MARYLAND,

Respondent

PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS OF MARYLAND

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# QUESTIONS PRESENTED

1. Did the trial court's refusal to instruct the jury that no adverse inference could be drawn from Petitioner's failure to testify at his capital sentencing proceeding violate the fifth and fourteenth amendments?
2. Did the prosecutor's comments on Petitioner's failure to testify at his capital sentencing proceeding violate the fifth and fourteenth amendments?
3. Did the use of victim impact evidence at Petitioner's capital sentencing violate the eighth and fourteenth amendments?
4. Does the Maryland capital sentencing statute, as applied in Petitioner's case, violate the eighth and fourteenth amendments?
5. Does the Maryland capital sentencing statute contain an unconstitutional standard of proof?

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No.

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STATE OF MARYLAND,  
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ON WRIT OF CERTIORARI  
TO THE COURT OF APPEALS OF MARYLAND

OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported at 306 Md. 172, 507 A.2d 1098 (1986) and is reproduced in the Appendix at 22-57.

JURISDICTION

The opinion of the Court of Appeals of Maryland was filed on May 7, 1986. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(3).



CONSTITUTIONAL PROVISIONS,  
STATUTES AND RULE

The following are set forth in the Appendix:

CONSTITUTIONAL PROVISIONS

United States Constitution  
Amendments V, VIII, XIV

STATUTES

Maryland Code, Article 27,  
Sections 412, 413 and 414

RULE

Maryland Rule 4-343

STATEMENT OF THE CASE

Petitioner, John Booth, was convicted of the robbery and murder of an elderly couple, Irvin and Rose Bronstein. Pursuant to Maryland Code, Art. 27, §412-415, the jury sentenced Petitioner to death for the murder of Mr. Bronstein and life imprisonment for the murder of Mrs. Bronstein. Petitioner also received three consecutive sentences of twenty years each for two counts of robbery and one count of conspiracy to rob. On May 7, 1986, the Court of Appeals of Maryland affirmed Petitioner's convictions and sentences.

REASONS FOR GRANTING THE WRIT

I.

Petitioner, who elected not to testify at his sentencing proceeding, requested the following instructions:

Every citizen charged with a crime has the right to remain silent at trial, including the sentencing hearing. This is because it is the

prosecutor's responsibility at a sentencing to prove the citizen guilty of an aggravating circumstance beyond a reasonable doubt. It is not the citizen's responsibility to prove himself innocent of any aggravating circumstances, nor is it the citizen's responsibility to prove that life imprisonment is the appropriate punishment.

John Booth did not testify in this phase, as was his right. You shall not draw any inference of guilt from this choice. You shall not allow this choice to prejudice him in any way.

If you use his choice not to testify in any manner, you will have violated your oath that you have taken as jurors. (Apx. 58.)

The trial judge refused to give the instruction. The Maryland Court of Appeals upheld the trial court's action on the ground that Petitioner, in so far as he elected to allocute pursuant to Maryland Rule 4-343(d), did not remain silent and, therefore, was not entitled to an instruction. 306 Md. at 209-210.

In Carter v. Kentucky, 450 U.S. 288, 305 (1981), this Court held that the Fifth Amendment privilege against self-incrimination requires state trial judges to give, upon request, a "prophylactic instruction" that no adverse inference may be drawn from a defendant's decision not to testify. Carter involved a trial on guilt or innocence. In Estelle v. Smith, 451 U.S. 454, 462-63 (1981), this Court stated:

We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees.

While Smith did not involve a requested jury instruction, at least one court, relying on Smith and Carter, has found that the refusal to give a no-adverse-inference instruction in a capital sentencing proceeding constitutes reversible error. See People v. Ramirez, 98 Ill. 2d 439, 75 Ill. Dec. 241, 457 N.E.2d 31, 35-36 (1983). The question whether a no-adverse-inference instruction is constitutionally compelled in capital sentencing proceedings will continue to arise in the state courts and warrants review by this Court.

The Maryland Court of Appeals plainly erred in its ruling that Petitioner waived any right to a jury instruction when he elected to allocute. Presumably a jury understands the difference between testimony and allocution. (Certainly, the jury in the instant case understood that difference after the prosecutor finished commenting to them. See Section II *infra*.) Thus, there remains a "danger that the jury will give evidentiary weight to a defendant's failure to testify", and it is that danger that a no-adverse-inference instruction is designed to "minimize." Carter, *supra* at 305. If a defendant in a capital sentencing proceeding is entitled to a prophylactic instruction, that right should not be affected by the decision to allocute.<sup>1</sup>

<sup>1</sup>Petitioner's position that he was entitled to a no-adverse-inference instruction does not, of course, preclude the possibility that allocution may constitute a limited fifth amendment waiver. Under a limited waiver theory, allocution may subject a defendant to prosecutorial comment on the distinction between allocution and testimony, *see*

## II.

Pursuant to Maryland Rule 4-243(d), Petitioner allocuted at his sentencing proceeding. Over objection, the prosecutor then made the following comments in summation to the jury:

[N]othing that John Booth said to you this morning is evidence....

Remember what the Judge told you, I believe in his very first statement to you, evidence is three things. It is stipulations, that which counsel agrees to be fact, it is documents or pictures or actual objects placed into evidence and it is testimony under oath subject to cross-examination from the witness chair. What you heard this morning was John Booth in his right of allocution. Something different than testimony. For the law provides that any man before he is sentenced can say anything that is on his mind. But anything that is on his mind is not an elevated level of evidence....

There is but one reason John Booth did not take the witness stand and present his story as he told it to you in allocution. I'm not so naive a man to believe Mr. Booth would be so moved by the prospect of an oath that he would not break his oath. But, ladies and gentlemen, he stood here and testified, not under oath, for one reason only, to avoid cross-examination.

I assure you we had some questions for Mr. Booth. I ask you, don't be conned by this con man, don't be conned by this man who travels with fifteen names, don't be conned by a most accomplished liar.

United States v. Warner, 428 F.2d 730, 739 (8th Cir. 1970) (en banc), cert. denied, 400 U.S. 930 (1970); United States ex rel. Miller v. Follette, 278 F. Supp. 1003, 1007-08 (E.D.N.Y.), aff'd, 397 F.2d 363 (2d Cir. 1968), cert. denied, 393 U.S. 1039 (1969); Jones v. State, 381 So.2d 983, 993 (Miss. 1980) cert. denied, 449 U.S. 1003 (1980); State v. Johnson, 121 Wis. 2d 237, 358 N.W.2d 824 (Wis. App. 1984), as well as an instruction by the court to the same effect, *see* United States v. Curtiss, 330 F.2d 278, 281 (2d Cir. 1964).

But, even though, we had no cross-examination, even though we couldn't ask the man one question ... the lies shined through his statement. He just wasn't, for all his talents, a con man. He just wasn't that good a liar. (Apx. 59-64.)

The tension between a defendant's right to argue pro se and the constitutional prohibition against prosecutorial comment on a defendant's failure to testify has been addressed in a number of jurisdictions. Some courts have found that a defendant's pro se argument based on facts outside the record may operate as a limited waiver of the defendant's fifth amendment protection. In United States ex rel. Miller v. Follette, supra, Judge Weinstein explained:

Treating the unsworn testimonial statement of the defendant as a partial waiver of ... the privilege against self-incrimination provides a practical solution. The prosecution can then be permitted to comment that the defendant's statements were not given under oath while he was subject to cross-examination and that they are, therefore, less weighty than sworn testimony. The constitutional privilege of the criminal defendant appearing pro se would be adequately protected were he given a clear and direct warning by the court that such limited comment might follow if he continued to give what amounted to unsworn testimony.

278 F. Supp. at 1007. See also Jones v. State, supra, 381 So.2d at 993; State v. Johnson, supra, 358 N.W.2d at 826-830; cf. Bontempo v. Fenton, 692 F.2d 954, 958-959 (3d Cir. 1982), cert. denied, 460 U.S. 1055 (1983) (no fifth amendment violation where prosecutor's comments were directed at defendant's argument rather than his failure to testify).

Other courts have accorded even greater deference to a defendant's fifth amendment rights. In United States v. Warner, supra, the Eighth Circuit ruled that a prosecutor generally is prohibited from commenting on a defendant's failure to testify even if the comment is in response to a defendant's pro se argument.

In most cases judges and prosecutors can adequately perform their tasks without commenting on a defendant's failure to testify. A judge can warn a pro se defendant as to his excesses and out of the jury's presence perhaps warn him of the possible loss and waiver of Fifth Amendment rights which may be attendant upon failure to follow the judge's instructions. A prosecutor can indicate that a defendant's comments are not evidence as he would state that an attorney's comments are not evidence without commenting on a pro se defendant's failure to testify.

428 F.2d at 739. See also United States v. Curtiss, supra.

No court has so completely ignored a defendant's fifth amendment rights as the Maryland Court of Appeals has in the instant case. Petitioner was never warned that by exercising his state provided right to allocute he was exposing himself to the possibility of prosecutorial comment on his failure to testify. Moreover, it was never determined that Petitioner's allocution amounted to unsworn testimony, thus triggering the prosecutor's right to comment. Petitioner's allocution appears to be a good-faith attempt to argue on the basis of the facts in evidence. (Apx. 65-73.) Finally, the prosecutor's comments far exceeded explanations to the jury on the difference between allocution and statements given under oath and subject to

cross-examination. The prosecutor argued, essentially, that Petitioner's decision to allocute but not to testify was evidence of his guilt.

Judge Eldridge of the Maryland Court of Appeals was prepared to adopt a limited waiver rule such as that espoused in Miller and Jones. He recognized, however, that the prosecutor's comments in the instant case exceeded all proper bounds.

I agree with the majority that the prosecuting attorney in this case was entitled to tell the jury that evidence includes testimony under oath or subject to cross examination, but I cannot agree that the prosecution is permitted to tell the jury that the defendant did not take the witness stand in order to avoid cross examination.

Booth v. State, 306 Md. at 229 (Eldridge, J., dissenting).

The tension between the fifth amendment privilege against self-incrimination and a defendant's right to argue pro se obviously assumes special importance in the context of a death penalty case and warrants review by this Court.

### III.

In support of its argument that aggravating circumstances were not outweighed by mitigating circumstances, the State introduced a "Victim Impact Statement" prepared by the Division of Parole and Probation (Apx. 74-79). The Statement, which was admitted into evidence pursuant to the Maryland Code, Article 41, § 124 (1984 Supp.), discussed the positive qualities of the victims and the effects of the murders upon the health and well-being of

the family members of the victims. The Maryland Court of Appeals rejected Petitioner's claims that the admission of victim impact evidence violates the eighth and fourteenth amendments and that the statutory provision admitting such evidence is unconstitutional. 306 Md. at 222-223.

The decision of the Court of Appeals of Maryland permitting introduction of victim impact evidence in capital cases is in conflict with the decisions of other courts which have considered the issue and determined that victim impact evidence is generally irrelevant in death penalty proceedings. The reasoning of these courts is persuasive:

The purpose of sentencing is to punish defendants in accordance with their level of culpability. We think it obvious that a defendant's level of culpability depends not on fortuitous circumstances such as the composition of his victim's family, but on the circumstances over which he has control. A defendant may choose, or decline, to premeditate, to act callously, to attack a vulnerable victim, to commit a crime while on probation, or to amass a record of offenses. All of the factors of Rule 421 are based upon such choices which the defendant makes of his own will. In contrast, the fact that a victim's family is irredeemably bereaved can be attributable to no act of will of the defendant other than his commission of homicide in the first place. Such bereavement is relevant to damages in civil action, but it has no relationship to the proper purposes of sentencing in a criminal case.

People v. Levitt, 136 Cal. App. 3d 500, 203 Cal. Rptr. 276, 288 (1984) (emphasis added). Similarly, in Muckel v. State, 233 Ga. 337, 211 S.E.2d 361 (1974), The Georgia Supreme Court vacated the sentence in a rape case where the trial court had permitted testimony that the victim had been outgoing, loving, and a good student before the crime but



after it became withdrawn, scared and nervous and ultimately discontinued her studies.

To allow the sentence imposed to be influenced by such evidence would mean that the severity of the punishment could depend on the emotional state of the unfortunate victim.

In People v. Ramirez, supra, the policeman's widow testified in the capital proceeding and the Court concluded:

We agree that the deceased's widow had no evidence of probative value to contribute to the establishment of the two factors the State was seeking to prove in stage one of the sentencing hearing. The State has not offered any valid purpose which was served by calling Mrs. Koumoundouros to the stand. The general rule, as we quoted previously, deals with testimony in a murder case that is elicited incidentally or evidence which is presented in such a manner as to cause the jury to believe it is material. In the instant case, the prosecutor specifically called the deceased's widow to the stand and asked her about her husband. Mrs. Koumoundouros testified that she was married to the deceased on September 7, 1977, the date of the murder. We believe that the admission of this testimony was error because, even though defense counsel's objection was sustained, the testimony was purposely presented in such a manner as to cause the jury to believe that the fact that the deceased left a widow was material to the determination of his eligibility for the death penalty.

457 N.E.2d at 38.

In Moore v. Zant, 722 F.2d 640 (11th Cir. 1983), the victim impact evidence was found to bear on a relevant sentencing factor where, in response to the defendant's evidence suggesting that the victim had been an accomplice in the robbery, the State introduced testimony by the victim's father as to the victim's good character and positive attributes. In upholding the Georgia Supreme

Court's ruling that the evidence, limited in its scope and content, was admissible to rebut an issue injected by the defense, the majority recognized that a death sentence may not be imposed "on the basis of the peculiar characteristics of the persons involved" and stated that "[a]ny explanation of the character of the victim is fraught with constitutional danger." 722 F.2d at 646.

The death penalty cannot be imposed under sentencing procedures that create a substantial risk that the penalty will be imposed in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S. 153, 188 (1976). The sentence must be based on an objective consideration of the character of the defendant and the circumstances of the crime. Spaziano v. Florida, 468 U.S. 447 (1984); California v. Ramos, 463 U.S. 992 (1983); Barclay v. Florida, 463 U.S. 939 (1983); Zant v. Stephens, 462 U.S. 862 (1983); Godfrey v. Georgia, 446 U.S. 420 (1980); Jurek v. Texas, 428 U.S. 262 (1976).

Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg, supra at 189. The weighing of aggravating and mitigating factors was designed to satisfy that purpose and approved by the Court in Gregg. This process focuses the deliberations in a rational way on the offender and the offense. Yet the introduction of a victim impact statement

defeats these efforts to channel the sentencer's discretion. By focusing on the character of the victim and the effect of the victim's death on the family, the victim impact statement interjects arbitrary factors into the deliberations.

It imparts an aggravating character to factors that are totally irrelevant to the sentencing process. See Zant v. Stephens, supra 462 U.S. at 885. It invites sentencing on the basis of the victim's social status, on whether the particular victim was more or less precious to his survivors than another victim, and whether those survivors are more or less articulate and impressive than others. It trades on the victim's social position and class. See Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas J., concurring). These distinctions have been said to be arbitrary, since "to punish on those bases furthers no discernible social or public purposes." Id. at 312 (White, J., concurring). "The concern for avoiding arbitrariness naturally implies that imposing a death sentence on the bases of peculiar characteristics -- such as race, religion, or wealth -- is forbidden." Moore v. Zant, supra, 722 F.2d at 646. Any basis for imposing a death sentence which relates neither to the crime itself nor the defendant is an arbitrary basis and constitutionally proscribed.

As Judge Cole of the Maryland Court of Appeals noted in his dissent on this issue:

[T]he ultimate crime [in a capital case] is the taking of a life, and there can be no further measurement as to the value of the life taken. The proper focus in the capital sentencing

procedure must be upon the circumstances "of the individual offense and the individual offender," Jurek v. Texas, supra, 428 U.S. at 273-74, 96 S. Ct. at 2957, 49 L.Ed.2d at 939 (Stevens, J., joined by Stewart & Powell, JJ.), and not upon the particular victim's family....

Impact evidence from the victim's family has but one purpose: "to exacerbate the aggravating circumstances established by the prosecution." [Lodowski v. State, 302 Md. 691, 786, 490 A.2d 1228, 1276 (1985) (Cole, S., dissenting).] This type of evidence, however, has no place in a statutory weighing process which owes its very existence to the constitutional mandate that the death penalty must not be administered in an arbitrary or capricious manner.

Booth v. State, 306 Md. at 233, 240-41 (Cole, J., dissenting). Judge Cole found thirty-one jurisdictions that authorize the use of some type of victim impact evidence in sentencing proceedings. Lodowski v. State, 302 Md. 691, 754 n.3, 490 A.2d 1228 (1985), vacated on other grounds, 106 S.Ct. 1469 (1986). Thus, the issue presented here is likely to recur and merits review by this Court.

#### IV.

The Maryland capital sentencing statute, Md. Code, Art. 27, §§ 412-415 (1957, 1982 Repl. Vol.), was enacted in 1978. Under the statute, the sentencing authority must first determine whether one or more statutorily prescribed circumstances exist beyond a reasonable doubt. If none are found, the sentence shall be life imprisonment. § 413(f). If one or more aggravating circumstances are found, the



sentencing authority must then determine whether any mitigating circumstances exist by a preponderance of the evidence. § 413(g). If both aggravating and mitigating circumstances are found, the sentencing authority must weigh the circumstances against each other. As for the balancing process, the statute provides:

"Weighing mitigating and aggravating circumstances. - (1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.

(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.

(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life." § 413(h).

Pursuant to § 413(1) of the statute, the Maryland Court of Appeals adopted rules of procedure to govern sentencing proceedings, including a standard form verdict sheet. Md. Rule 4-343. If the balancing process is reached, the verdict sheet requires the sentencing authority to respond "Yes" or "No" to the statement:

"Based on the evidence, we unanimously find that it has been proven by a PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked "yes" in section II outweigh the aggravating circumstances marked "yes" in section I."

If the section is "completed and marked 'no,' enter 'Death.'" Id.

Tichnell v. State, 287 Md. 695, 415 A.2d 830 (1980)

was the first capital case under the new statute to reach the Maryland Court of Appeals. The Court reversed the sentence on the basis of a prejudicial remark by the trial judge. Id. at 743-45. Nevertheless, the Court addressed, in dicta, various aspects of the new statute including its burdens of proof. Noting that the statute does not expressly allocate the burdens of proof among the parties, the Court explained that, as a practical matter, "the State bears both the risk of nonproduction and nonpersuasion" with respect to proving the existence of aggravating circumstances while "the accused [bears] the risk of nonproduction and nonpersuasion" with respect to proving mitigating circumstances. The Court concluded:

"Finally, if the sentencing authority finds, by a preponderance of the evidence, that the mitigating circumstances do not outweigh the aggravating circumstances, the death penalty must be imposed. § 413(h)(2). Because the State is attempting to establish that the imposition of the death penalty is an appropriate sentence, the statute places the risk of nonpersuasion on the prosecution with respect to whether the aggravating factors outweigh the mitigating factors." Id. at 730.

The conclusion that the State bears the risk of nonpersuasion with respect to proving that aggravating circumstances outweigh mitigating circumstances was puzzling in several respects. First, it appears to conflict with the plain language of both the statute and the court rule. See Stebbing v. Maryland, 105 S.Ct. 276, 280-281 n.6 (1984).

(Marshall, J., dissenting from denial of certiorari); Evans v. State, 304 Md. 487, 542-43, 499 A.2d 1261 (1985)

(McAuliffe, J., dissenting). It also conflicts with the interpretation of the Maryland statute by the Chief Legislative Officer in the only piece of legislative history to accompany the statute. T.J. Peddicord, Memorandum to the General Assembly on Capital Punishment--Senate Bill 374 and House Bill 604 (Dec. 14, 1977). The Peddicord Memorandum provides:

"Subsection (H) of § 413 requires the court or jury to weigh the aggravating and mitigating factors, assuming that some mitigation has been found to exist. If it finds that mitigation does not outweigh aggravation, the sentence shall be death. (H)(2). If it finds that mitigation does outweigh aggravation, the sentence shall be life imprisonment. (H)(3)." Id. at 36.

Finally, the use of the preponderance of the evidence standard in the balancing process strongly suggests that the legislature intended to impose the risk of nonpersuasion on the defendant. See, generally, Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975).

The confusion generated by Tichnell was addressed directly by both parties in their briefs to the Court of Appeals in Johnson v. State, 292 Md. 405, 439 A.2d 542 (1982). The appellant quoted from the Court's decision in Tichnell.

"Because the State is attempting to establish that the imposition of the death penalty is an appropriate sentence, the statute places the risk of nonpersuasion on the prosecution with respect to whether

the aggravating circumstances outweigh the mitigating factors. [287 Md.] at 849."

Appellant then asserted, "While Appellant agrees that the statute should place the burden on the state, it plainly does not." Brief for Appellant at 11-12. Accord, Brief for Appellant at App. 14, Thomas v. State, 301 Md. 294, 483 A.2d 6 (1984); Brief for Appellant at 54-55, Stebbing v. State, 299 Md. 331, 473 A.2d 903, cert. denied, 105 S.Ct. 276 (1984). The State responded in Johnson, supra:

"It is possible ... that this Court [in Tichnell] misperceived the law as Appellant suggests and that the statute merely indicates that, in the weighing process, the judge or jury must employ a preponderance of the evidence standard concluding either that the mitigating circumstances do or do not outweigh [sic] the aggravating circumstances, and does not clearly state the result if that balance is somehow in equipoise." Brief for Appellee at 9.

The decision of the Court of Appeals in Johnson appeared to settle the confusion generated by Tichnell. The decision did not refer to the language in Tichnell that placed the burden of persuasion with respect to § 413(h) on the prosecution, but, instead, quoted from that part of Tichnell that placed the risk of nonpersuasion on the defendant. "'If the mitigating circumstances do not outweigh the aggravating circumstances by a preponderance of the evidence, ... then a sentence of death must be imposed.'" Johnson, supra, 292 Md. at 438; see id. at 443 ("It may be that the jurors actually considered [the mitigating circumstance] but did not feel that it outweighed the

aggravating factors present in the case.") See also Thomas v. State, supra, 301 Md. at 234 (the sentencer "found that appellant's family background and demographic characteristics constituted mitigating factors under § 413(g)(8) but concluded that they did not outweigh the statutory aggravating factor."); Stebbing v. State, supra, 299 Md. at 374 ("the evidence supports the trial court's finding that the aggravating circumstance is not outweighed by the mitigating circumstance"). See, generally, Note, "Tichnell v. State -- Maryland's Death Penalty: The Need for Reform," 42 Md. 1. Rev. 875 (1983).

After Johnson, the Maryland Public Defender's Office, representing the vast majority of death row inmates before the Court of Appeals, consistently argued that the double burden imposed on defendants by the statute to prove both the existence of mitigating circumstances and that they outweigh the aggravating circumstances is unconstitutional. See, e.g., Brief for Appellant at 91-97, Reid v. State, 305 Md. 9, 501 A.2d 436 (1985); Brief for Appellant at 107-112, Johnson v. State, 303 Md. 487, 495 A.2d 1 (1985); Brief for Appellant at 59-64, Maziarz v. State, 302 Md. 1, 485 A.2d 245 (1984). The same standard form constitutional attack was made in Petitioner's case, as well. Appellant's Brief at 83-86 (Apx. 80-86). Until Foster v. State, 304 Md. 439, 499 A.2d 1236 (1985), reh'g. denied, 305 Md. 306, 503 A.2d 1326 (1986), the Court of Appeals refused to respond directly to the argument but continued to use language

indicating that the burden was on the accused to prove that mitigating circumstances outweigh aggravating circumstances. See Johnson v. State, supra, 303 Md. at 537 ("In the panel's opinion, the mitigating factor did not outweigh the aggravating factor"); Maziarz v. State, supra, 302 Md. at 6 ("the Maryland death penalty statute requires that a sentence of life imprisonment be imposed if, by a preponderance of the evidence, the sentencer finds that the mitigating circumstances outweigh the aggravating circumstances"). See also Colvin v. State, 299 Md. 88, 122, 472 A.2d 953, cert. denied, 105 S.Ct. 226 (1984) ("A sentence of death may be invoked only if the mitigating circumstances do not outweigh the aggravating circumstances."); Tichnell v. State, 297 Md. 432, 449, 466 A.2d 1 (1983), cert. denied, 466 U.S. 923 (1984) ("We .... conclude that the aggravating circumstances are not outweighed by the mitigating circumstances"). But see Trimble v. State, 300 Md. 387, 415 n.16, 478 A.2d 1143 (1984), cert. denied, 105 S.Ct. 1231 (1985) ("In Tichnell I, we also construed § 413(h)(2), which provides that the trier of fact shall determine whether 'the mitigating circumstances outweigh the aggravating circumstance,' to place the burden of persuasion on the prosecution."). In Foster, supra, issued after Petitioner's case was briefed and argued in the Court of Appeals, the Court stated: "Again we need not decide whether a statute imposing such a 'burden' on a defendant would be constitutional for the Maryland statute, as interpreted in Tichnell I and later cases, places no such



burden on the defendant." 304 Md. at 476-77. But see Stebbing v. Maryland, *supra*, 105 S.Ct. at 280-281, n.6 (Marshall, S., dissenting from denial of certiorari); Evans v. State, *supra*, 304 Md. 487, 556 n.5, 499 A.2d 1261 (1985) (McAuliffe, J., dissenting).<sup>2</sup> Addressing the issue of legislative intent, the Court stated:

"With regard to the burden of proof, merely because the General Assembly in § 413(h) referred in paragraph (2) to whether 'mitigating circumstances do not outweigh the aggravating circumstances'

2

Judge McAuliffe responded to the Foster majority:

"The majority in Foster concedes there may have been some 'misunderstanding' of the statute as 'authoritatively interpreted' in Tichnell v. State, 287 Md. 695, 720-37, 415 A.2d 830 (1980) (Tichnell I) and Calhoun v. State, 297 Md. 963, 635-36, 468 A.2d 45 (1983). I find the single statement made in Tichnell I, 287 Md. at 730, 415 A.2d 830, inadequate in the context of that case and in the context of the capital cases decided thereafter by this Court to effectively convey the import of the interpretation today clearly announced by the Court in Foster. The 'authoritative interpretation' of Calhoun consists of nothing more than a repetition of the statement made in Johnson v. State, 292 Md. 405, 439 A.2d 542 (1982), that the argument was 'thoroughly considered and rejected' in Tichnell I. The frequency with which defense counsel have argued since Tichnell I that the statute improperly places the burden of ultimate persuasion upon the defendant, and the failure of experienced and able defense counsel to argue for an instruction to the opposite effect upon the authority of Tichnell I suggests to me that the 'interpretation' announced by Foster must be ranked among the best kept secrets in this State. All counsel and the learned trial judge in the instant case were understandably led to believe that the burden was upon the defendant by the language of our capital cases subsequent to Tichnell I, as well, of course, by the language of the statute."

and in paragraph (3) to whether 'mitigating circumstances outweigh the aggravating circumstances,' instead of using the reverse order or some other phraseology, does not reflect a legislative intent to place any burden or risk upon the accused. If the legislature had added a fourth paragraph to subsection (h), specifying the result if the sentencing authority found that mitigating and aggravating circumstances were in a state of even balance or if the sentencing authority was unable to determine which outweighed the other, there would have been a clear inference regarding the allocation of the burden or risk. But the legislature added no such fourth paragraph. Instead, the legislature in § 413(h) merely directed the sentencing authority to engage in a weighing or balancing process, without indicating which side has the burden of proof. The legislature contemplated in § 413(h) that the sentencing authority would simply evaluate the aggravating circumstances which the prosecution had established beyond a reasonable doubt, and evaluate the mitigating circumstances which it found to exist, and determine which outweighed the other." 304 Md. at 477-78.

But see Evans v. State, *supra*, 304 Md. at 542-43 (McAuliffe, J., dissenting). Foster filed a Motion for Reconsideration which was denied with an opinion by the Court of Appeals. Foster v. State, 305 Md. 306, 503 A.2d 1326 (1986). Relying on its opinion denying Foster's Motion for Reconsideration,

<sup>3</sup>If the order of listing aggravating and mitigating circumstances is irrelevant, as the Court states, one is left to wonder why the Court of Appeals, since Foster, has switched from discussing whether the "mitigating circumstances outweighed the aggravating circumstances" to considering whether "the aggravating circumstances outweighed the mitigating circumstances." See Bowers v. State, 306 Md. 120, 164, 507 A.2d 1072 (1986); Evans v. State, *supra*, 304 Md. at 539; Foster v. State, *supra*, 304 Md. at 487.

the Court of Appeals rejected Petitioner's constitutional attack.. 306 Md. at 224.

Although it generally is the province of the state courts to "interpret, and where they see fit, to reinterpret" their own constitutions and statutes, Gardner v. Louisiana, 368 U.S. 157, 169 (1961), limitations are imposed on judicial reconstruction by the due process clause. A court may not use its interpretive authority as an "obvious subterfuge to evade consideration of a federal issue." Mullaney v. Wilbur, supra, 421 U.S. at 696, n.11. The decision in Foster was "an obvious attempt to avoid the constitutional implication of forcing a defendant to shoulder the burden of persuading the sentencing authority that he should not be put to death." Evans v. State, supra, 304 Md. at 345 (McKuliffe, J., dissenting).

Assuming that Petitioner's constitutional attack was meritorious, the Court's strained construction after Petitioner was sentenced does not eliminate the unconstitutionality of Petitioner's sentence. "[W]here an accused is tried under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act ...." Ashton v. Kentucky, 384 U.S. 195, 198 (1966). The same principle applies to sentencing statutes. See Hicks v. Oklahoma, 447 U.S. 343, 346-47 (1980).

Reconstruction may render a criminal statute unduly vague with respect to those persons convicted prior to the reconstruction:

"If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' ...or to 'guess at the statute's meaning and differ as to its application,' .. the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question." Howie v. City of Columbia, 378 U.S. 347, 352 (1964).

The Maryland capital sentencing statute plainly failed to apprise "trial judges, jurors and attorneys throughout th[e] State" of the standard of proof to be applied. Evans v. State, supra, 304 Md. at 342 (McKuliffe, J., dissenting). See also Stebbing v. Maryland, supra, 105 S.Ct. at 280 n.11 ("The jury or court is left on its own to guess at the burden of proof on the ultimate question.") (Marshall, J., dissenting from denial of certiorari). Although the vagueness "might be cured for the future by [the] authoritative judicial gloss," of the Court of Appeals, it is not cured as to Petitioner whose sentence was imposed without adequate guidance. Howie v. City of Columbia, supra, 378 U.S. at 353.

Finally, a court may not reconstruct a capital sentencing statute so as to render the imposition of the death penalty on some persons arbitrary and capricious. A statute which permits some persons to be sentenced to death

while the lives of other persons in identical circumstances are spared clearly permits the imposition of death in an arbitrary and capricious manner. See Gregg v. Georgia, supra, 428 U.S. at 188 (death penalty may not be imposed where there is "no basis for distinguishing the few cases in which it is imposed from the many cases in which it is not") (quoting from Furman v. Georgia, 408 U.S. 238, 313 (1972) (opinion of White, J.)); Gregg v. Georgia, supra, 428 U.S. at 188 ("death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual [where] of all the people convicted of capital crimes, many just as reprehensible as these, the petitioners [are] among a capriciously selected random handful upon whom the sentence of death has been imposed.") (quoting Furman, supra, 408 U.S. at 390 (opinion of Stewart, J.)). Switching the burden of proof after several people, including Petitioner, have been sentenced to death, creates a distinct possibility that identically situated people will be treated differently.

As constitutional principles and policies are evolving in the capital sentencing area, state appellate courts increasingly are engaged in active construction of the statutes both to preserve the constitutionality of their statutes and to promote certain desired policies.<sup>4</sup> Guidance

<sup>4</sup> For example, the Florida death penalty statute directs the sentencer to determine whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. Ann. § 921.141(2)(b) and (3)(6) (1965). In State v. Dixon, 263 So.1, 9 (Fla.

by this Court is necessary to resolve due process issues raised by such appellate activism. Guidance will promote the correct and orderly disposition of cases by the state courts. It will also promote honesty in the judicial decision-making process. If courts know the bounds and requirements of judicial reconstruction, there will be less need to

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1973), cert. denied, 416 U.S. 943 (1974), the Florida Supreme Court explained: "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more mitigating circumstances ...." More recently, however, in response to a claim that a jury instruction impermissibly shifted the burden to the defendant to prove the impropriety of the death penalty, the Court stated: "[T]he jury instruction, if given alone, may have conflicted with the principles of law enunciated in Mullaney and Dixon. A careful reading of the transcript, however, reveals that the burden of proof never shifted." Arango v. State, 411 So.2d 172, 174 (Fla. 1982).

The North Carolina statute requires the sentencer to determine "whether any sufficient mitigating circumstances or circumstances exist ... which outweigh the aggravating circumstance or circumstances found to exist." N.C. Gen. Stat. § 15A-2000(b)(2) (1983). In State v. McDougall, 308 N.C. 1, 301 S.E.2d 308, 327 (1983), the North Carolina Supreme Court, setting forth the "order and form of the issues to be submitted to the jury," placed the burden on the State to prove beyond a reasonable doubt the ultimate propriety of the death sentence.

The New Mexico statute simply instructs the sentencer to weigh the aggravating factors against the mitigating factors. N.M. Stat. Ann. § 31-20A-2.B (1978). In State v. Gilbert, 100 N.M. 392, 671 P.2d 640, 650 (1983), cert. denied, 465 U.S. 1073 (1984), the New Mexico Supreme Court held that under the statute, "the burden of proof and the burden of final persuasion rest squarely upon the State."

The Utah statute instructs the sentencer to consider mitigating and aggravating circumstances. Utah Code Ann. § 76-3-207 (Supp. 1985). The Utah Supreme Court has interpreted the statute to require the state to prove that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. See State v. Wood, 646 P.2d 71, 82-85 (Utah), cert. denied, 459 U.S. 988 (1982).



resort to device and denial as the Maryland Court of Appeals has done in the instant case.

V.

In Addington v. Texas, 441 U.S. 418, 423 (1979), this Court explained:

"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact-finding, is to 'instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision."

This Court has repeatedly stressed the need for reliability in the capital punishment context.

"[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

These principles would appear to preclude placing the burden on the defendant to prove the "ultimate question" of the propriety or impropriety of the death penalty. See Stebbing v. Maryland, supra, 105 S.Ct. at 280 n.11 (Marshall, J., dissenting from denial of certiorari). See also White v.

Maryland, 105 S.Ct. 1779 (Marshall & Brennan, JJ., dissenting from denial of certiorari); Evans v. State, supra, 304 Md. at 550-553 (McAuliffe, J., dissenting); Note, supra, 42 Md. L. Rev. 875.

The Maryland statute now has been reconstrued to place the burden of proving the ultimate question on the State. This does not dispose of Petitioner's claim, however, because the statute was otherwise interpreted and applied at the time Petitioner was sentenced. See Ashton v. Kentucky, supra, 384 U.S. at 198; Hicks v. Oklahoma, supra, 447 U.S. at 346-47. Despite the construction of the Court of Appeals "that black is white," Evans v. State, supra, 304 Md. at 558 (McAuliffe, J., dissenting), the burden was squarely placed on Petitioner to prove that mitigating circumstances outweighed aggravating circumstances in his case. See id. at 557-58. Twenty persons in addition to Petitioner, have been sentenced to die in Maryland without the benefit of the Foster reconstruction. At least seven other states, by statute or judicial construction, also require the accused to prove that mitigating circumstances outweigh aggravating circumstances.<sup>5</sup> The question whether

<sup>5</sup> The seven states are: Arizona, see Ariz. Rev. Stat. Ann. § 13-703(E) (1978) (construed in State v. Watson, 120 Ariz. 441, 586 P.2d 1253, 1258-59 (1978), cert. denied, 440 U.S. 924 (1979)); Colorado, see Colo. Rev. Stat. Ann. § 16-11-103(2)(a)(II) (Supp. 1985); Missouri, see Mo. Ann. Stat. § 565.030.4(3) § 46-18-305 (1985); Nevada, see Nev. Rev. Stat. § 200.030.4(a) (1985); Oklahoma, see 21 Okla. Stat. Ann. § 701.11 (1983); and Wyoming, Wyo. Stat. § 6-2-102 (d)(i)(B) (1983).

the State may require a criminal defendant to prove the ultimate impropriety of the death sentence is one that has never been addressed by this Court. It affects many defendants in several states and warrants this Court's review.

The Maryland statute, like statutes in several states, does not require proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances.<sup>6</sup> This issue, which has never been addressed directly by this Court, is the source of disagreement and confusion in the lower courts. See, e.g., *Ford v. Strickland*, 696 F.2d 804, 817-19 (11th Cir.), cert. denied, 464 U.S. 865 (1983); *id.* at 877-883 (Anderson & Clark, JJ.,

<sup>6</sup> Among the states in which the death penalty statute has been authoritatively construed not to require proof beyond a reasonable doubt are: California, see *People v. Frierson*, 25 Cal.3d 142, 158 Cal. Rep. 281, 599 P.2d 587, 609-610 (1979); Idaho, see *State v. Sivak*, 105 Idaho 900, 674 P.2d 396, 401 (1983), cert. denied, 468 U.S. 1220 (1984); Illinois, see *People v. Garcia*, 97 Ill.2d 58, 73 Ill. Dec. 414, 454 N.E.2d 274, 282-83 (1983), cert. denied, 467 U.S. 1260 (1984); Missouri, see *State v. Boulder*, 635 S.W.2d 673, 684 (Mo. 1982), cert. denied, 459 U.S. 1137 (1983); New Mexico, see *State v. Fennell*, 101 N.M. 732, 688 P.2d 769, 772-773 (1984); and Pennsylvania, see *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937, 963 (1982), cert. denied, 461 U.S. 970 (1983).

At least six states require proof beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances. These states are: Arkansas, see Ark. Stat. Ann. § 41-1302(b) (1977 Repl. Vol.); Massachusetts, see Mass. Gen. Laws Ann. ch. 279, § 68 (Supp. 1985); North Carolina, see *State v. McDougall*, *supra*, 301 S.E.2d at 327; Ohio, see Ohio Rev. Stat. Ann. § 2929.03(D)(1) (1982); Utah, see *State v. Wood*, *supra*, 648 P.2d at 83-84; and Washington, see Wash. Rev. Code Ann. § 10.95.060(4) (Supp. 1986). In addition, Texas and Virginia do not use a balancing approach but require proof of all circumstances beyond a reasonable doubt. See Tex. Code Crim. Pro. art. 37.071(c) (Supp. 1986); Va. Code § 9.2-264.4 (1983 Repl. Vol.).

dissenting); *Evans v. State*, *supra*, 304 Md. at 550-553 (McAuliffe, J., dissenting); *Tichnell v. State*, *supra*, 267 Md. at 732-34; See generally *Smith v. North Carolina*, 459 U.S. 1056 (1982) (Stevens, J., respecting the denial of certiorari); *State v. Wood*, *supra*, 648 P.2d at 80-85; Comment, "Capital Punishment and the Burden of Proof: The Sentencing Decision," 17 Cal. W.I. Rev. 316 (1981).

Finally, the Maryland statute is unique in prescribing a preponderance of the evidence standard with respect to the balancing process. This is a different question than whether the reasonable doubt standard is constitutionally compelled. The usual rationale for not requiring proof beyond a reasonable doubt in the balancing process is that it is not a fact-finding process and, thus, does not lend itself to a rigid standard of proof. See, e.g., *Ford v. Strickland*, *supra*, 696 F.2d at 817-19. Maryland, however, has tried to create a balancing process that resembles a rigid fact-finding process and has assigned a standard of proof that "by its very terms demands consideration of the quantity, rather than the quality, of the evidence ...." *Santosky v. Famer*, 455 U.S. 745, 764 (1982). Even if proof beyond a reasonable doubt is not constitutionally compelled in the death sentencing process, it does not follow that the constitution permits the Maryland scheme, under which a death penalty is mandated when the sentencer is convinced that, "as likely as not," *Mullaney v. Wilbur*, *supra*, 421 U.S. at 703, the sentence is appropriate.

See generally Note, supra, 42 Md. l. Rev. 875.

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# APPENDIX

86-5020  
BOOTH  
v.  
MARYLAND

EDITOR'S NOTE

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## APPENDIX

### CONSTITUTIONAL PROVISIONS INVOLVED

#### United States Constitution, Amendment V:

...[N]or shall [any person] be compelled in any criminal case to be a witness against himself....

#### United States Constitution, Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

#### United States Constitution, Amendment XIV, provides in pertinent part:

...[N]or shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within the jurisdiction the equal protection of the laws.

### STATUTORY PROVISIONS INVOLVED

#### Maryland Code (1957, 1982 Repl. Vol.) Art. 27, Secs. 412-414 provides:

##### Section 412. Punishment for murder.

(a) Designation of degree by court or jury. -- If a person is found guilty of murder, the court or jury that determined the person's guilt shall state in the verdict whether the person is guilty of murder in the first degree or murder in the second degree.

(b) Penalty for first degree murder. -- A person found guilty of murder in the first degree shall be sentenced either to death or to imprisonment for life. The sentence shall be imprisonment for life unless (1) the State notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of death, and advised the person of each aggravating circumstance upon which it intended to rely, and (2) a sentence of death is imposed in accordance with Sec. 413.

(c) Penalty for second degree murder. -- A person found guilty of murder in the second degree shall be sentenced to imprisonment for not more than 30 years.



Section 413. Sentencing procedure upon finding of guilty of first degree murder.

(a) Separate sentencing proceeding required. -- If a person is found guilty of murder in the first degree, and if the State had given the notice required under Sec. 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial has been completed to determine whether he shall be sentenced to death or imprisonment for life.

(b) Before whom proceeding conducted. -- This proceeding shall be conducted:

(1) Before the jury that determined the defendant's guilt; or

(2) Before a jury impaneled for the purpose of the proceeding if:

(i) The defendant was convicted upon a plea of guilty;

(ii) The defendant was convicted after a trial before the court sitting without a jury;

(iii) The jury that determined the defendant's guilt has been discharged by the court for good cause; or

(iv) Review of the original sentence of death by a court of competent jurisdiction has resulted in a remand for resentencing; or

(3) Before the court alone, if a jury sentencing proceeding is waived by the defendant.

(c) Evidence; argument; instructions. -- (1) The following type of evidence is admissible in this proceeding:

(i) Evidence relating to any mitigating circumstance listed in subsection (g) of this section;

(ii) Evidence relating to any aggravating circumstance listed in subsection (d) of this section of which the State had notified the defendant pursuant to Section 412(b);

(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures;

(iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and

(v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements.

(2) The State and the defendant or his counsel may present argument for or against the sentence of death.

(3) After presentation of the evidence in a proceeding before a jury, in addition to any other appropriate instructions permitted by law, the court shall instruct the jury as to the findings it must make in order to determine whether the sentence shall be death or imprisonment for life and the burden of proof applicable to these findings in accordance with subsection (f) or subsection of (h) of this section.

(d) Consideration of aggravating circumstances. -- In determining the sentence, the court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer who was murdered while in the performance of his duties.

(2) The defendant committed the murder at a time when he was confined in any correctional institution.

(3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

(4) The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

(5) The victim was a child abducted in violation of § 2 of this article.

(6) The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.

(9) The defendant committed more than one offense of murder in the first degree arising out of the same incident.

(10) The defendant committed the murder while committing or attempting to commit a robbery, arson, rape, or sexual offense in the first degree.

(e) Definitions. -- As used in this section, the following terms have the meanings indicated unless a contrary meaning is clearly intended from the context in which the term appears:

(1) The terms "defendant" and "person", except as those terms appear in subsection (d)(7), include only a principal in the first degree.

(2) The term "correctional institution" includes any institution for the detention or confinement of persons charged with or convicted of a crime, including Patuxent Institution, any institution for the detention or confinement of juveniles charged with or adjudicated as being delinquent, and any hospital in which the person was confined pursuant to an order of a court exercising criminal jurisdiction.

(3) The term "law enforcement officer" has the meaning given in § 727 of Article 27. However, as used in subsection (d), the term also includes (i) an officer serving in a probationary status, (ii) a parole and probation officer, and (iii) a law enforcement officer of a jurisdiction outside of Maryland.

(f) Finding that no aggravating circumstances exist. -- If the court or jury does not find, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall state that conclusion in writing, and the sentence shall be imprisonment for life.

(g) Consideration of mitigating circumstances. -- If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:

(1) The defendant has not previously (i) been found guilty of a crime of violence, (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(3) The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

(5) The youthful age of the defendant at the time of the crime.

(6) The act of the defendant was not the sole proximate cause of the victim's death.

(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.

(h) Weighing mitigating and aggravating circumstances. -- (1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.

(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.

(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life.

(i) Determination to be written and unanimous. -- The determination of the court or jury shall be in writing, and, if a jury, shall be unanimous and shall be signed by the foreman.

(j) Statements required in determination. -- The determination of the court or jury shall state, specifically:

(1) Which, if any, aggravating circumstances it finds to exist;

(2) Which, if any, mitigating circumstances it finds to exist;

(3) Whether any mitigating circumstances found under subsection (g) outweigh the aggravating circumstances found under subsection (d);

(4) Whether the aggravating circumstances found under subsection (d) are not outweighed by mitigating circumstances found under subsection (g); and

(5) The sentence, determined in accordance with subsection (f) or (h).

(k) Imposition of sentence. -- (1) The court shall impose the sentence determined by the jury under subsection (f) or (h).

(2) If the jury, within a reasonable time is not able to agree as to sentence, the court shall dismiss the jury and impose a sentence of imprisonment for life.

(3) If the sentencing proceeding is conducted before a court without a jury, the court shall impose the sentence determined under subsection (f) or (h).

(1) Rules of procedure. -- The Court of Appeals may adopt rules of procedure to govern the conduct of a sentencing proceeding conducted pursuant to this section, including any forms to be used by the court or jury in making its written findings and determinations of sentence.

#### Section 414. Automatic review of death sentences.

(a) Review by Court of Appeals required. -- Whenever the death penalty is imposed, and the judgment becomes final, the Court of Appeals shall review the sentence on the record.

(b) Transmission of papers to Court of Appeals. -- The clerk of the trial court shall transmit to the Clerk of the Court of Appeals the entire record and transcript of the sentencing proceeding within ten days after receipt of the transcript by the trial court. The clerk also shall transmit the written findings and determination of the court or jury and a report prepared by the trial court. The report shall be in the form of a standard questionnaire prepared and supplied by the Court of Appeals of Maryland and shall include a recommendation by the trial court as to whether or not imposition of the sentence of death is justified in the case.

(c) Briefs and oral argument. -- Both the State and the defendant may submit briefs and present oral argument within the time provided by the Court.

(d) Consolidation of appeals. -- Any appeal from the verdict shall be consolidated in the Court of Appeals with the review of sentence.

(e) Considerations by Court of Appeals. -- In addition to the consideration of any errors properly before the Court on appeal, the Court of Appeals shall consider the imposition of the death sentence. With regard to the sentence, the Court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether the evidence supports the jury's or court's finding of a statutory aggravating circumstance under § 413 (d);

(3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and

(4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(f) Decision of Court of Appeals. -- (1) In addition to its review pursuant to any direct appeal, with regard to the death sentence, the Court shall:

(i) Affirm the sentence;

(ii) Set aside the sentence and remand the case for the conduct of a new sentencing proceeding under § 413; or

(iii) Set aside the sentence and remand for modification of the sentence to imprisonment for life.

(2) The Court shall include in its decision a reference to the similar cases which it considered.

(g) Rules of procedure. -- The Court may adopt rules of procedure to provide for the expedited review of all death sentences pursuant to this section.

#### RULES INVOLVED

Maryland Rule 4-343:

Rule 4-343. Sentencing -- Procedure In Capital Cases.

(a) Applicability. -- This Rule applies whenever sentence is imposed under Code, Article 27, Sec. 413.

(b) Statutory Sentencing Procedure. -- When a defendant has been found guilty of murder in the first degree and the State has given the notice required under Code, Article 27, Sec. 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial pursuant to the provisions of Code, Article 27, § 413.

(c) Judge. -- Except as provided in Rule 4-361, the judge who presides at trial shall preside at the sentencing proceeding.

(d) Allocution. -- Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement.

#### (CAPTION)

#### FINDINGS AND SENTENCING DETERMINATION

##### Section 1

Based upon the evidence, we unanimously find that each of the following aggravating circumstances that is marked "yes" has been proven BEYOND A REASONABLE DOUBT. Each of the aggravating circumstances that has not been so proven is marked "no."

1. The victim was a law enforcement officer who was murdered while in the performance of the officer's duties.

Yes No

2. The defendant committed the murder at a time when confined in a correctional institution.

Yes No

3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

Yes No



4. The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

Yes No

5. The victim was a child abducted in violation of Code, Article 27, Sec. 2.

Yes No

6. The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

Yes No

7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

Yes No

8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.

Yes No

9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.

Yes No

10. The defendant committed the murder while committing or attempting to commit robbery, arson, rape in the first degree or sexual offense in the first degree.

Yes No

(If one or more of the above are marked "yes," complete Section II. If all of the above are marked "no," do not complete Sections II and III.)

## Section II

Based upon the evidence, we unanimously find that each of the following mitigating circumstances that is marked "yes" has been proven to exist by A PREPONDERANCE OF THE EVIDENCE. Each mitigating circumstance that has not been so proved is marked "no."

1. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, mayhem, murder, robbery, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

The defendant previously (i) has not been found guilty of a crime of violence; and (ii) has not entered a plea of guilty or nolo contendere to a charge of a crime of violence; and (iii) has not been granted probation on stay of entry of judgment pursuant to a charge of a crime of violence.

Yes No

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

Yes No

3. The defendant acted under substantial duress, domination, or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

Yes No

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

Yes No

5. The defendant was of a youthful age at the time of the crime.

Yes No



6. The act of the defendant was not the sole proximate cause of the victim's death.

Yes No

7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

Yes No

8. Other facts specifically set forth below constitute mitigating circumstances:

Yes No

(Use reverse side if necessary)

(If one or more of the above in Section II have been marked "yes," complete Section III. If all of the above in Section II are marked "no," do not complete Section III.)

### Section III

Based on the evidence, we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked "yes" in Section I.

Yes No

### DETERMINATION OF SENTENCE

Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions:

1. If all of the answers in Section I are marked "no," enter Life Imprisonment.

2. If Section III was completed and was marked "yes," enter "Life Imprisonment."

3. If Section II was completed and all of the answers were marked "no," then enter "Death."

4. If Section III was completed and was marked "no," enter "Death."

We unanimously determine the sentence to be \_\_\_\_\_

Foreman	Juror 7
Juror 2	Juror 8
Juror 3	Juror 9
Juror 4	Juror 10
Juror 5	Juror 11
Juror 6	Juror 12
or, _____ JUDGE	

(f) **Advice of the Judge.** -- At the time of imposing sentence, the judge shall advise the defendant of the right of appeal and the time allowed for the exercise of this right. The judge shall also advise a defendant who receives a sentence of death that (1) the sentence only will be reviewed automatically by the Court of Appeals, and (2) the sentence will be stayed pending review of the sentence by the Court of Appeals and any appeal which the defendant may take.

(g) **Report of Judge.** -- After sentence is imposed, the judge promptly shall prepare and send to the parties a report in the following form:

(CAPTION)

### REPORT OF TRIAL JUDGE

#### I. Data Concerning Defendant

- A. Date of Birth
- B. Sex
- C. Race
- D. Address
- E. Length of Time in Community
- F. Reputation in Community

- G. Family Situation and Background
1. Situation at time of offense (describe defendant's living situation including marital status and number and age of children)
  2. Family history (describe family history including pertinent data about parents and siblings)
- H. Education
- I. Work Record
- J. Prior Criminal Record and Institutional History (list any prior convictions, disposition, and periods of incarceration)
- K. Military History
- L. Pertinent Physical or Mental Characteristics or History
- M. Other Significant Data About Defendant
- II. Data Concerning Offense
- A. Briefly describe facts of offense (include time, place, and manner of death; weapon, if any; other participants and nature of participation)
  - B. Was there any evidence that the defendant was under the influence of alcohol or drugs at the time of the offense? If so, describe.
  - C. Did the defendant know the victim prior to the offense?  
Yes \_\_\_\_\_ No \_\_\_\_\_  
1. If so, describe relationship.
  2. Did the prior relationship in any way precipitate the offense? If so, explain.
  - D. Did the victim's behavior in any way provoke the offense? If so, explain.
  - E. Data Concerning Victim
    1. Name
    2. Date of Birth
    3. Sex
    4. Race
    5. Length of time in community
    6. Reputation in community
  - F. Any Other Significant Data About Offense
- III. A. Plea Entered by Defendant:  
Not guilty\_\_\_\_; guilty\_\_\_\_; not guilty by reason of insanity \_\_\_\_
- B. Mode of Trial:  
Court\_\_\_\_ Jury\_\_\_\_  
If there was a jury trial, did defendant challenge the jury selection or composition? If so, explain.

- C. Counsel:
1. Name
  2. Address
  3. Appointed or retained  
(If more than one attorney represented defendant, provide data on each and include stage of proceeding at which the representation was furnished.)
- D. Pre-Trial Publicity -- Did defendant request a mistrial or a change of venue on the basis of publicity? If so, explain. Attach copies of any motions made and exhibits filed.
- E. Was defendant charged with other offenses arising about of the same incident? If so, list charges; state whether they were tried at same proceeding, and give disposition.
- IV. Data Concerning Sentencing Proceeding
- A. List aggravating circumstance(s) upon which State relied in the pretrial notice.
  - B. Was the proceeding conducted before same judge as trial? \_\_\_\_\_  
before same jury? \_\_\_\_\_  
If the sentencing proceeding was conducted before a jury other than the trial jury, did the defendant challenge the selection or composition of the jury? If so, explain.
  - C. Counsel -- If counsel at sentencing was different from trial counsel, give information requested in III C above.
  - D. Which aggravating and mitigating circumstances were raised by the evidence?
  - E. On which aggravating and mitigating circumstances were the jury instructed?
  - F. Sentence imposed: life imprisonment  
Death
- V. Chronology
- Date of Offense \_\_\_\_\_
- Arrest \_\_\_\_\_
- Charge \_\_\_\_\_
- Notification of intention to seek penalty of death: Trial (guilt/innocence) -- began and ended \_\_\_\_\_
- Post-trial Motions Disposed Of \_\_\_\_\_
- Sentencing Proceeding -- began and ended \_\_\_\_\_
- Sentence Imposed \_\_\_\_\_
- VI. Recommendation of Trial Court As To Whether Imposition of Sentence of Death is Justified.

VII. A copy of the Findings and Sentencing Determination made in this action is attached to and made a part of this report.

Judge

### CERTIFICATION

I certify that on the \_\_\_\_\_ of \_\_\_\_\_,  
19\_\_\_\_ I sent copies of this report to counsel for the  
parties for comment and have attached any comments made by  
them to this report.

**Judge**

Within five days after receipt of the report, the parties may submit to the judge written comments concerning the factual accuracy of the report. The judge promptly shall file with the clerk of the trial court, and in the case of a life sentence with the Clerk of the Court of Appeals the report in final form, noting any changes made, together with any comments of the parties.

10

Attachment 3

STATE OF MARYLAND

VS.

JOHN BOOTH AKA  
MARVIN BOOTH

22 23

CIRCUIT COURT

PCR

BALTIMORE CITY

CASE NO. 20318812-17

• • • • •

FINDING AND SENTENCING DETERMINATION

SECTION I

Based upon the evidence, we unanimously find that each of the following aggravating circumstances that is marked "yes" has been proven BEYOND A REASONABLE DOUBT. Each of the aggravating circumstances that has not been so proven is marked "no".

1. The victim was a law enforcement officer who was murdered while in the performance of the officer's duty. YES ☒ NO ☐
2. The defendant committed the murder at a time when confined in a correctional institution. YES ☐ NO ☒
3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer. YES ☐ NO ☒
4. The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct. YES ☐ NO ☒
5. The victim was a child abducted in violation of Code, Article 27, §2. YES ☐ NO ☒
6. The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder. YES ☐ NO ☒

SECTION I continued

- |   |   |  |
|---|---|--|
| 7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration. | YES <input type="checkbox"/>            | NO <input checked="" type="checkbox"/> |
| 8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.   | YES <input type="checkbox"/>            | NO <input checked="" type="checkbox"/> |
| 9. The defendant committed more than one offense of murder in the first degree arising out of the same indictment.  | YES <input type="checkbox"/>            | NO <input checked="" type="checkbox"/> |
| 10. The defendant committed the murder while committing or attempting to commit robbery, arson, rape in the first degree or sexual offense in the first degree.                             | YES <input checked="" type="checkbox"/> | NO <input type="checkbox"/>            |

If one or more of the above are marked "yes", complete Section II.  
If all of the above are marked "no", do not complete Sections II and III.

SECTION II

Based upon the evidence, we unanimously find that each of the following mitigating circumstances that is marked "yes" has been proven to exist by A PREPONDERANCE OF THE EVIDENCE. Each mitigating circumstance that has not been so proven is marked "no".

1. The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

YES ☐ NO ☒

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

YES ☐ NO ☒

3. The defendant acted under substantial duress, domination, or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

YES ☐ NO ☒

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

YES ☐ NO ☒

5. The defendant was of a youthful age at the time of the crime.

YES ☐ NO ☒



SECTION II continued

6. The act of the defendant was not the sole proximate cause of the victim's death. YES ☒ NO
7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society. YES ☒ NO
8. Other facts specifically set forth below constitute mitigating circumstances: YES ☒ NO

A Family Environment  
1 Child Neglect  
2 Lack of Strong  
Father Image

(Use reverse side if necessary)

SECTION III

Based on the evidence, we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked "yes" in Section I.

YES ☒ NO

DETERMINATION OF SENTENCE

Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instruction:

1. If all of the answers in Section I are marked "No," enter "Life Imprisonment."
2. If Section III was completed and was marked "Yes," enter "Life Imprisonment."
3. If Section II was completed and all of the answers were marked "no," then enter "Death."
4. If Section III was completed and was marked "No," enter "Death."

We unanimously determine the sentence to be Death

<u>E. Angelina Kelly</u> Foreman	<u>Gerardine Smalls</u> Juror
<u>Alma Jones</u> Juror 2	<u>Nancy Brown</u> Juror 3
<u>William D. Bell</u> Juror 4	<u>Beverly A. Stebbins</u> Juror 5
<u>Katherine K. DeMange</u> Juror 6	<u>Alma A. Smith</u> Juror 7
<u>Marie Palmer</u> Juror 8	<u>Kathleen M. Alkela</u> Juror 9
<u>Marguerite Taylor</u> Juror 10	<u>Michael Kenneth Harris</u> Juror 11



to be put to death. An accused is ordinarily entitled to have the jury make this determination without the prejudicial effect and "inherent disadvantages and limitations" of lay jurors. As the Supreme Court has pointed out, such restraining devices should be used only as a "last resort" and "justified by an essential state interest specific to each trial."<sup>2</sup> In light of these standards, the use of shackles in the present case cannot be justified.

I would vacate the death sentence and remand the case for a new sentencing proceeding.

COLE and McAULIFFE, JJ., have authorized me to state that they concur with the views expressed herein.

507 A.2d 1008  
John BOWEN a/k/a Marvin Ruth

STATE of Maryland,  
No. 151, Sept. Term, 1984.  
Court of Appeals of Maryland  
May 7, 1985.

Defendant was convicted in the Circuit Court, Baltimore City, Edward J. Angelitti, J., of murder in the first degree as a principal in the first degree, *mayhem* in the first degree of another victim, robbery of two victims, and conspiracy to rob, and sentenced to death sentence, life sentence, and consecutive sentences of 20 years each for the

4. *Brown v. Allen*, 197 U.S. at 144, 90 S.Ct. at 1061.

5. *Ibid.*

6. *Holtzworth v. Flynn*, 100 S.Ct. at 1346.

for psychiatrist to express opinions which defendant would then argue were relevant to credibility of witness, or whether request was viewed as motion directed to witness' competency to testify, where defendant possessed copies of hospital records of witness' psychiatric treatment by the time she testified at the first trial, if not earlier, and witness testified at length at two trials without her demeanor causing either court or counsel to question her competence.

#### 4. Criminal Law §-423(b)

Statement by alleged conspirator, to which defendant responded by saying that conspirator was exaggerating and did not know what he was talking about, was admissible against defendant, where the conversation took place while conspirator and defendant anticipated returning to home of murder victims in order to steal more property and the jury could consider defendant's statement as an effort to minimize and cover up conspirator's incriminating statement to witness so that witness would not upset the joint plan of conspirator and defendant to return to murder scene.

#### 5. *Harris* §-206(2)

Instruction on premeditation in murder prosecution, that jury might consider the multiple injuries suffered by the victim and their intensity as providing adequate evidence of premeditation, was proper, where instruction did not limit jury's consideration of all of the evidence when applying the definition of premeditation, which was defined in charge without exception being taken, the intervals between stab wounds inflicted on victim evidenced sufficient time for reflection and decision, and evidence of premeditation included stabbing of victim with his hands tied behind his back, and admitted killing of victim because he knew defendant.

#### 6. Conspiracy §-87(1)

Evidence supported conviction of conspiracy to rob, despite lack of a witness to what transpired between defendant and alleged conspirator prior to or at the time of

two robberies and conspiracy to rob, and he appealed. The Court of Appeals, Robinson, J., held that: (1) State's argument at sentencing hearing contrasting defendant's allocation with elevated level of evidence which in sworn testimony subject to cross-examination was permissible and did not violate state or federal protections against compulsory self incrimination; (2) testimony of State Parole Commission chairman about parole and work release was not relevant and should have been excluded from sentencing proceeding if proper objections had been made; and (3) defendant did not have right to require written submission on verdict sheet in sentencing proceeding of nonstatutory factors which he claimed existed and operated in mitigation.

Affirmed.

Eldridge, Cole and McAuliffe, JJ., filed opinions concurring in part and dissenting in part.

#### 1. Criminal Law §-104.1b

Jury §-104.12, 14

Any error in denying challenge for cause to venireman was waived and harmless beyond reasonable doubt, where the venireman did not serve as juror and was not the object of one of defense's allotted peremptory challenges, jury was impeached without defendant's having exhausted all of his peremptory challenges, and defense counsel advised court that court's jury was acceptable to defense subject to general challenges on qualifications of juror and nonimpeachment of jury.

#### 2. Criminal Law §-428(1)

Trial judge has discretion to determine whether opinion evidence of questionable relevance will be sufficiently helpful to jury to be admissible in criminal prosecution.

#### 3. Witnesses §-77

Denial of ambiguous and somewhat offhanded oral motion for psychiatric examination of witness was proper, whether request was viewed as attempt to lay foundation

the first entry into victim's home, by 9 p.m. on the day of the murders of victims whose home was robbed, defendant and coconspirator were at apartment with host from victims' home and planned to return there with licensed driver to use victims' car to haul away more loot.

#### 7. Jury §-108

Excluding prospective jurors opposed to capital punishment in murder prosecution was proper.

#### 8. Criminal Law §-406.6(1)

Refusal to inquire separate juror in murder prosecution, one to determine guilt or innocence which would include opponents of the death penalty, and another to determine sentence if that were to become necessary, was proper.

#### 9. Criminal Law §-104.1(3)

Claim that instruction that an inference of guilt generally arises from possession of recently stolen property improperly converted such inference into a presumption was not preserved for appellate review, where judge prepared instructions in writing and gave counsel opportunity to review and to take exception to them in advance of reading them to jury, and defendant did not except to that portion of the instructions of which he complained.

#### 10. Criminal Law §-87(1)

Instruction that generally there was an inference of guilt which arose from possession of recently stolen property did not prejudicially convert inference into a presumption in light of the charge as a whole, which included general instruction on inferences defining circumstantial evidence as evidence which proved facts indirectly or facts or circumstances from which inference could arise and provided that defendant was entitled to every inference which could reasonably be drawn from the evidence and that where two inferences could be drawn from the same evidence, defend-

and was entitled to the inference which was consistent with his innocence. Md Rule 4-325(a).

### 11. Criminal Law §-713

State premissibly contravened defendant's alteration during sentencing proceeding, which included denial of facts and attack on prosecutors for fabricating statements of witnesses and putting words in their mouths, with the elevated level of evidence which in sworn testimony subject to cross-examination and argued that jury could consider content of defendant's statement to be true but should not. Md Rule 4-343(b). Code, Courts and Judicial Proceedings, § 9-107; Const. Declaration of Rights, Art. 22, U.S.C.A. Const. Amendments 5, 14.

### 12. Criminal Law §-713

State may comment on convicted defendant's alteration prior to sentencing, that may be considered by jury or court in mitigation, and urge the rejection of the alteration by arguments which may include attacking defendant's credibility by explicit reference to the lack of an oath and the lack of testing by cross-examination. Md Rule 4-343(b).

### 13. Witnesses §-399

Constitutional privilege against compulsory self incrimination is infringed where government elicits on cross-examination of defendant at second trial that he had not testified at prior trials. U.S.C.A. Const. Amend. 5.

### 14. Witnesses §-399

Constitutional privilege against compulsory self incrimination does not permit requiring defendant to testify as first witness in defense case or not at all. U.S.C.A. Const. Amend. 5.

### 15. Criminal Law §-713

State's prohibition against self incrimination did not preclude prosecutor from commenting on defendant's allocation prior to sentence, including reference to lack of an oath and to lack of testing by cross-examination. Md Rule 4-343(b). Code, Courts and Judicial Proceedings, § 9-107; Const. Declaration of Rights, Art. 22.

### 16. Criminal Law §-713

Alteration by defendant prior to sentencing was more like testimony than silence, and for Fifth Amendment purposes was testimonial, carrying with it at a minimum a waiver of any privilege to avoid comment by prosecutor on the alteration, including arguments that alteration was sworn, not subject to cross-examination, not evidence, and not to be believed. Md Rule 4-343(b), U.S.C.A. Const. Amendments 5, 14.

### \* 17. Criminal Law §-707(1)

Defendant's requested instruction that defendant chose not to testify at sentencing hearing and that no inference of guilt should be drawn from that choice was properly denied, where defendant had altered. Md Rule 4-343(b).

### 18. Criminal Law §-1171.1(b)

Trial court's exercise of its discretion on permissibility scope of closing argument would not constitute reversible error unless it was clearly abused and prejudicial to the accused.

### 19. Criminal Law §-2107a

Denial of objection to prosecutor's argument in sentencing hearing, in which prosecutor defined meaning related to defendant's prior sentence for assault with intent to maim, as disfiguring someone, cutting off an ear, gouging out an eye, cutting off a hand, and being the ultimate crime of cruelty about death, was proper.

### 20. Criminal Law §-120(7)

State's argument in sentencing hearing, referring to questions asked by defense on voir dire about jurors' religion and to Catholic priest's having been "recruited" after the guilty verdict, was proper argument with respect to Catholic priest's opinion evidence that defendant basically made decisions much as a child would and that to have full justice, justice had to be tempered by love and mercy.

### 21. Criminal Law §-775.2

State's argument that if people did not stand together against the crime that defendant killed had committed, then as a community and a people and a civilization, the people stand for nothing because it was then a community that would not protect itself, was a permissible argumentative presentation of the deterrence policy in sentencing rather than an impermissible fear factor or suggestion that jury transfer responsibility for their sentencing decision to the community at large.

### 22. Criminal Law §-1020.1(1)

Almost objection, error in admission of evidence in criminal proceeding was not preserved for review as of right.

### 23. Humicide §-354

Testimony from State Parole Commission chairman about parole and work release was not relevant and should have been excluded in sentencing hearing in murder prosecution if proper objections had been made.

### 24. Humicide §-354

State's cross-examination of State Parole Commission chairman on prohibition of work release in sentencing hearing was proper under doctrine of curative admissibility to combat defendant's proffered excludable evidence that time before defendant would be eligible for parole if life sentences were imposed for murder and maximum consecutive sentences were imposed for all other crimes of which defendant stood convicted would be 45 years less diminution by credits for good behavior.

### 25. Humicide §-354

Fact that another had been convicted as a principal in second degree in the murder of which defendant was convicted did not require that jury find as a mitigating factor in sentencing that defendant was not the sole proximate cause of death. Code 1957, Art. 27, § 413g(6).

### 26. Criminal Law §-706

Defendant did not have a right to require a written submission on verdict sheet of nonstatutory factors which he claimed existed and specified in mitigation in sentencing proceeding. Md Rule 4-343(a).

### 27. Humicide §-354

In any capital murder case, jury is to consider whether statutory mitigating factors exist, and if one is found to exist, it is a mitigating circumstance as a matter of law. Md Rule 4-343(a).

### 28. Humicide §-354

Jury must find both that circumstance of nonstatutory mitigating factor exists and that the circumstance is mitigating in finding nonstatutory mitigating factor in capital murder case. Md Rule 4-343(a).

### 29. Constitutional Law §-770(1)

#### Criminal Law §-133.3

#### Humicide §-354

Introduction of victim impact evidence in capital murder sentencing proceeding did not inject arbitrary factor into the proceeding and thus violate the Eighth and Fourteenth Amendments. Code 1957, Art. 41, § 124; U.S.C.A. Const. Amendments 8, 14.

### 30. Criminal Law §-600.1(1)

Primary purpose of General Assembly in enacting requirement for victim impact information in relation to sentencing was to insure that some consideration would be given to victims of certain types of crimes when the perpetrator was sentenced, so that the emphasis on the perpetrator as an individual would not be so great as to exclude consideration of the victim. Code 1957, Art. 41, § 124.

### 31. Humicide §-354

In capital cases, victims for whom victim impact information is required for sentencing purposes include survivors of the murdered individual. Code 1957, Art. 41, § 124.

20. *Brumfield* 6-184

There is no per se constitutional defect in using victim impact statements including impact on survivors of the murdered individual at capital sentencing proceeding. Code 1987, Art. 41, § 124.

21. *Criminal Law* 6-188, 211

Sentencing authority is not constitutionally restricted to considering only the operative facts in the commission of the crime, in addition to the circumstances of the perpetrator, but can consider in addition the impact on victim.

22. *Brumfield* 6-184

Admission of victim impact statements of survivors of murdered individuals that were relatively straightforward and factual descriptions of the effects of murders on members of the family did not indicate that imposition of death sentence was under the influence of passion, prejudice, or any other arbitrary factor. Code 1987, Art. 27, § 41(4)(b).

23. *Brumfield* 6-184

Use of death sentence on defendant convicted of murder in first degree as principal in first degree was not excessive or disproportionate, where defendant killed 76-year-old man while his hands were tied behind his back by stabbing him in the chest 12 times for the purpose of preventing him from identifying defendant, defendant murdered 75-year-old wife as well, and defendant had been adjudged guilty of another first-degree murder, and had criminal record including convictions for two rapes, two assaults, two assaults with intent to ruin, and robbery.

24. *Criminal Law* 6-188, 211

Defense exception to trial court's failure to give requested instructions as they were written was inadequate to call to trial court's attention a claimed defect by way of absence of instruction on ultimate burden of proof in capital sentencing proceeding, as that issue was not presented in trial court for direct review on appeal. Md Rule 4-327(c).

25. *Criminal Law* 6-188, 211

Claimed defect in instruction in capital sentencing proceeding by omission of express instruction covering evenly balanced result in process of weighing aggravating and mitigating factors was waived on appeal by omission from appellate brief of any claim of error by such omission.

26. *Criminal Law* 6-188, 211

Absence of express instruction covering evenly balanced result in process of weighing aggravating and mitigating factors in capital sentencing proceeding was not plain error.

Julia Doyle Brumfield and George E. Burns, Jr., Appellants, Public Defenders (Alan H. Murrell, Public Defender, on brief), Baltimore, for appellants.

Valerie V. Chastler, Asst. Atty. Gen. (Stephen H. Sachs, Atty. Gen., on brief), Baltimore, for appellee.

Argued before MURPHY, C.J., SMITH, ELJINGER, CHASE, RODWICKY, CONNOR and McATIFFER, JJ.

RODWICKY, Judge.

We shall affirm the judgments of conviction and death sentences in this case for the reasons set forth below. (P) The sentence issues raised on appeal only involve eight through ten present questions of any novelty. These deal with the right of allocation conferred by a Maryland Rule of Procedure which was made applicable to capital cases as of July 1, 1984.

Appellant, John "Ace" Smith (Smith), and his friend, Willie "Sawtooth" Reid (Reid), in order to obtain money for heroin, on May 18, 1983, robbed and murdered an elderly couple in the victim's home. The victim were Levin Bern Stern, age 78, and his wife, Rose, age 75. Their bodies were found by their son on May 20 in the living room of their home. Each had been strangled in the chest twelve times, after having been bound and gagged. Mr. Brumfield was

found reclining face up on the sofa, with a cloth covering his face. Mrs. Brumfield was found face down on the floor. Their home had been ransacked. Property, including television sets, jewelry, and their 1972 Chevrolet Impala with which had been taken. The police found the automobile abandoned and partially stopped on the parking lot of the Plug House high-rise public housing projects in East Baltimore. The police were able to associate Smith with the abandoned car and arrested Smith June 7, 1983.

The first trial of the charges against Smith, before Honorable Justice W. Murphy, ended in a mistrial on April 23, 1984. See Smith v. State, 301 Md. 1, 491 A.2d 505 (1984). At retrial, a jury presided over by Judge Edward J. Angerelli in the fall of 1984 heard both the guilt or innocence phase and the sentencing phase. The jury found Smith guilty of the murder of Mr. Brumfield in the first degree, both premeditated and felony, and found that Smith was a principal in the first degree in that murder for which they imposed the death sentence. The jurors found Smith guilty of murder in the first degree of Mrs. Brumfield for which the court imposed a life sentence. Smith also received three consecutive sentences of twenty years each, the first of which was consecutive to the life sentence, for the robbery of Mr. Brumfield, the robbery of Mrs. Brumfield, and for conspiring with Reid and with his nephew, David Brumfield, to rob the Brumfields.

On this appeal Smith challenges the sufficiency of the evidence against him only as to the charge of conspiracy to rob. Neither Smith nor Reid testified as witnesses. At Smith's trial at which the jury could have found the following facts on guilt or innocence:

1. Willie Reid was the principal in the first degree in the murder of Mr. Brumfield in which Reid was sentenced to death. In Reid's case we have affirmed the judgment of conviction and upheld finding of premeditation and felony in the death sentence, without discussion or review of the death sentence. See Reid v. State, 301 Md. 9, 510 A.2d 128 (1987).

The Brumfields lived at 3412 Rockwood Avenue in West Baltimore. Smith, age 29 at the time of the murders, lived with his mother at 3416 Rockwood Avenue. Smith's friend Reid lived with his girlfriend, Vernada "Bennie" Mayoyk and her two sons, age nine and four at the time of the murders, in Mrs. Mayoyk's apartment at 490 Alquist Street in East Baltimore. On May 18, 1983, Smith met Reid at Mayoyk's apartment at about 4:00 p.m. Mayoyk went out with her children and, when she returned about 8:00 to 9:00 p.m., no one was at home. Reid and Smith returned to the apartment at about 9:00 p.m. They had heroin which Smith, Reid, and Mayoyk injected. Reid also had a small brown paper bag filled with jewelry.

When the contents of the bag were spread on a tablecloth, Mayoyk commented that the jewelry was cheap to which Reid, in the presence of Smith, replied that it was "white people's shit." In response to a question from Mayoyk, Reid, in Smith's presence, said he had made a "bushie" which Smith interpreted as meaning that "they went out and stole it."

At some point Smith telephoned his girlfriend, Jewel "Judy" Edwards, who lived in the 2800 block of Harford Road, and asked her to meet him at Mayoyk's apartment. Smith wanted Edwards to drive a car. She was a heavy operator but Smith, Reid, and Mayoyk were not nervous.

Rose "Tony" Cullen, a 17-year-old mother of two children who lived in the apartment across the hall from Mayoyk, dropped by Mayoyk's apartment while the jewelry was spread on the table. Smith and Reid asked her if she wanted to buy any of it. While Mrs. Cullen was in the apartment, Eddie Smith, his girlfriend, and another couple stopped by the apartment. Smith paid Reid \$2 so that he and his companions could use the apartment to inject their culture with heroin. Mrs. Cullen heard Smith and Reid

2. Smith and David Edwards were sentenced June 1, 1983, for their case. Smith was sentenced.



siding "the junkies" for the use of a car so that South and Reid could pick up some television sets.

When Ms. Edwards arrived at the Mayrath apartment, South explained that he wanted her to drive the car of a friend of his and that he needed someone who had a driver's license in the event the car was stopped by the police.

Late on the evening of May 18 or early in the morning of

May 19 all of the adults left the Alapogoch Street apartment.

South and his companions went their separate way. South

and Ms. Edwards, Reid and Ms. Mayrath told Ms. Collins

that they were going "to pick up the TV's."

The two couples took a cab to South's mother's home.

South went in the house while the others three remained

outside. South came out with seven plastic trash bags. He

then went back into his mother's house and came out with

garbage for everyone to wear. The group then went to the

car of the Brundage house. Before entering, South pointed

at the Brundage's car out to Ms. Edwards as the car which

she would be driving and handed her the keys to the car.

Also before the group entered the Brundage house, South

told the women that they should pay "no mind" if they saw

any dead bodies.

The two couples entered the house through the rear door

and the two women saw the blood and gagged corpses of

Mr. and Mrs. Brundage in the living room. The group

looked the house and looked the last, including two tele-

vision sets, into the Brundage's car. When someone re-

turned that they had left a trash bag in the house, South said

not to worry because the police would think that the bag

had been left by people who were working on the Brun-

dage's lawn that day.

The two couples returned with the last to the Alapogoch

Street apartment. South and Reid obtained bottles and the

couples "took up" and went to bed. Reid and Ms. Mayrath in

the bathroom, while South and Ms. Edwards used a sofa bed

in the living room. While lying in bed Ms. Edwards asked

South if the people whom she had seen in the house were

actually dead, and South replied that they were and that he

had killed the man while Reid had killed the woman.

The next morning Ms. Mayrath asked South why the

elderly couple had been killed, and South told her that it

was because the elderly couple knew South and his nephew.

South said to South or someone

1

111 During the day of prospective jurors South had

moved to strike one of them for reason and the motion was

denied. South argues that the juror had heard that a

previous guilty verdict had been returned and had stated

that he would give more weight to the testimony of a police

officer than to other witnesses. Even, if any, in denying

the challenge was waived and was harmless beyond a

reasonable doubt. The witnesses in question did not serve

as a juror and was not the object of the exercise by the

defense of one of its alleged peremptory challenges. The

jury was impeached without South's having exhausted all of

his peremptory challenges. Immediately prior to the

State's calling its first witness defense counsel advised the

court that "the Court's jury is acceptable to the defense

subject to the previous objections that have been made with

regard to the Witherspoon matter, and bifurcation." See

*Patterson v. State*, 204 Md. 439, 450-51, 499 A.2d 1226, 1231-32

(1985) and cases cited therein.

11

Appellant's second issue reaches back into the period

preceding the shorted first trial and asserts that the court

erred in denying an oral defense motion that the court

order Veranda Mayrath to submit to a psychiatric examina-

tion by a particular psychiatrist who had been identified in

discovery as an expert witness for South. The point is

irrelevant.

On the afternoon of March 27, 1984, the defense supple-

mented its answer to the State's motion for discovery and

advised that South intended to call Dr. John Brundage to

explain records of Johns Hopkins Hospital relating to Ms.

Mayrath's condition and treatment in April-May 1982. At a

pretrial hearing on April 3, 1984, the State orally moved

that Judge Murphy prohibit the defense from using the

hospital records and from having expert testimony based

upon them. The prosecution represented that the records

related to psychiatric treatment. He then called Ms. Ma-

ryath as a witness in support of the motion. She testified to

her preference that any such records be kept secret and

said that she had not commented to the release of any such

records. The purpose of this testimony was to lay a foundation

for a legal argument, to be made on a later day, that

the records represented privileged communications between

patient and psychiatrist as recognized in Md. Code (1981,

1984) Regs. Vol. 1, § 5-109 of the Courts and Judicial Pro-

ceedings Article.

Jury selection for the first trial started on April 5, 1984,

and continued through April 10. Late in the day of April 11

defense counsel delivered to the State a memorandum in

opposition to the State's motion to prohibit. Appellant

contended that the records showed Ms. Mayrath was diag-

nosed as an alcoholism and a palpating seizure, who had

experienced auditory and visual hallucinations and memory

blackouts. South submitted that these conditions affected

Ms. Mayrath's credibility and that Dr. Brundage was need-

ed to explain factual matters in the hospital records to the

jury.

As argued before Judge Murphy on April 12 the State

ultimately took the position that the hospital records could

be admitted just only through the particular attending phys-

ician whose opinions on medical matters were contained

therein. The court ruled that it would permit use of the

psychiatric records if the defense brought in the doctor who

had made the diagnosis. Defense counsel said that she

would certainly try to do that. The court further indicated

that if the attending doctor was not available he would

allow Dr. Brundage to testify to the accuracy of items in

the medical records. After the court had quickly disposed

of certain excluded matters, defense counsel orally moved

that the court order that Veranda Mayrath make herself

available for examination by one of our doctors, Dr. Mar-

tyrath. When the State asked if the defense were ques-

tioning Ms. Mayrath's "capacity" to testify as a witness,

defense counsel replied that "capacity is a very difficult

burden to make. Her competency is what the State is

talking about, I imagine." At that point Judge Murphy

denied the motion, without stating any reason for the

ruling.

On the afternoon of Friday, April 13, opening statements

were made to the jury and the first witness in the State's

case was heard. On the following Monday, April 16, at

10:07 a.m. counsel for South filed a motion, together with

an order signed by Judge Murphy, directing the production

of the Johns Hopkins Hospital Comprehensive Alcoholism

Program records on Ms. Mayrath. The motion recited that

the evidence of Ms. Mayrath's alcoholism is relevant to her

credibility as a witness for the State in this case. That

afternoon Ms. Mayrath began her direct examination with

money at the first trial. Her direct was resumed on the

morning of April 17. Cross-examination, which began that

morning and continued well into the afternoon, encompass-

ed in seventy pages of transcript. The hospital records were

used in the cross-examination and were marked for identifi-

cation.

At the retrial Ms. Mayrath was again examined and cross-

examined at length, including cross-examination about the

extent and effects of her drug and alcohol abuse.

In his brief on this appeal South characterized the State's

motion as a ruling on a motion for an examination "by a

defense doctor on the issue of whether she was competent

to testify." At no time, either in connection with the trial

or retrial did appellant move to exclude testimony from Ms.

Mayrath on the ground that she was incompetent to be a

witness. At no time did appellant present any medical

opinion, by affidavit or otherwise, that it was likely that Mr. Mazyck was incompetent.

"The test of incompetency is whether the witness has sufficient understanding to appreciate the nature and obligations of an oath and sufficient capacity to observe and describe accurately the facts in regard to which [the witness] is called to testify." [Fuentes v. State, 304 Md. 687, 697, 499 A.2d 1261, 1271 (1966)] quoting from Johnson v. Frederick, 149 Md. 272, 281-82, 117 A. 768, 771 (1922).

12.31 While Judge Murphy did not state for the record his reason for denying appellant's oral motion of April 12, 1964, the court could have viewed the request as an attempt to lay a foundation for Dr. Rosenman to express opinion which Booth would then argue were relevant to credibility, as opposed to competency. Were that the basis of the ruling, there would be no abuse of discretion. A trial judge has discretion to determine whether opinion evidence of questionable relevance will be sufficiently helpful to the jury. See *Stebbing v. State*, 299 Md. 331, 338, 473 A.2d 983, 912, cert. denied, — U.S. —, 195 S.Ct. 276, 43 L.Ed.2d 212 (1964).

If, however, we consider that appellant's oral motion was, as appellant now contends, a motion directed to Mr. Mazyck's competency to testify, Judge Murphy had already observed her when she testified briefly on April 3, 1964. That personal observation, coupled with the lack of any objection to competency at that time, would furnish an appropriate basis for the court's ruling.

In any event, when "determining whether a request for a mental examination should be granted, . . . a trial judge should carefully balance the demonstrated necessity for a compelled examination against the existence of important countervailing considerations." *Evans*, 304 Md. at 688, 499 A.2d at 1272. Here the appellant possessed copies of the hospital records of Mr. Mazyck's psychiatric treatment by the time she testified at the first trial, if not earlier. But

A colloquy at the bench which had followed objection to an earlier form of the same question developed the basis for the objection to be hearsay. Booth briefs this evidence point alternatively. He says that if the ruling was based on the theory that Reid and Booth were co-conspirators in a conspiracy to rob, Reid's statement to Smith was not admissible against Booth because any conspiracy to rob had terminated. Booth further contends that Reid's statement cannot be admissible as part of an admission against interest made by Booth because, when told of Reid's statement, Booth's response "add[ed] up to a clear-cut denial." *McCormick on Evidence* § 270 (E. Chas. 2d ed. 1964).

There was no error. Booth's response that Reid was exaggerating and did not know what he was talking about was an admission by Booth. Smith's conversation with Booth took place while Reid and Booth anticipated returning to the Bronsteins' home in order to steal more property, but before they had left Annapolis Street to go to the Bronsteins' for the second time. Under all of the evidence the jury could consider Booth's statement as an effort to minimize and cover up Reid's incriminating statement to Smith so that Smith would not, even inadvertently, upset the joint plan of Reid and Booth to return to the murder scene with a licensed driver.

## IV

151 This assignment of error is directed at an instruction to the jury concerning premeditation. The court defined premeditation in its charge and an exception was taken to that definition.<sup>4</sup> The court told the jury in Booth's case "that you may consider the multiple injuries and their intensity suffered by the victim as providing adequate evi-

<sup>4</sup> Recently, in *Ferrell v. State*, 394 Md. 679, 684, 500 A.2d 1070, 1072-73 (1965), we repeated the definition of premeditation drawn from *Chesley v. State*, 202 Md. 87, 106, 95 A.2d 572, 585, 86 (1953) as "some appreciable period of time during which [the accused] after having formed a specific purpose and design to kill had full and conscious knowledge of the purpose to do so."

for the ambiguity and somewhat off-handed oral motion of April 12, 1964, appellant's position in the trial court was that the records were relevant to credibility. Mr. Mazyck testified at length at two trials without any demonstrative evidence either the court or counsel in question has raised before. Under those circumstances appellant has failed to show that there was any abuse of discretion in the denial of the oral motion.

141 This issue concerns an alleged error in the admission of evidence during the direct examination by the State of Edwin Smith. Smith testified that he had injured himself with a hammer in Mazyck's bathroom in the presence of Reid with whom Smith had had a conversation. The State then questioned Smith as follows:

Q. After you left the bathroom—

A. Right.

Q. —what, if anything, did you say to this defendant [Smith], and use the exact words as best you can remember?

A. I asked him what was Rosenberg talking about, he said—

[OFFENSE COUNSEL] Objection.

THE COURT: Overruled.

Q. [STATE'S ATTORNEY] You may answer.

A. He [Reid] said he had just killed a couple mother fuckers.

Q. Did you respond to what you said?

A. Yes, he did.

Q. What, if anything, did he say?

A. He [Reid] said he [Reid] was just exaggerating, you know, talking something, he didn't know what he was talking about. [Italics added.]

3. The nearest antecedent to the italicized "he" indicates it refers to Reid.

dence of premeditation." Booth challenges the latter instruction. Citing *People v. Anderson*, 70 Cal.2d 16, 447 P.2d 942, 73 Cal.Rptr. 650 (1968); *People v. Hoffmeister*, 394 Mich. 155, 229 N.W.2d 305 (1975); and *Austin v. United States*, 382 F.2d 129 (D.C.Cr.1967), he contends that "the number of injuries cannot, alone, constitute proof of this element." (Emphasis in original).

We initially note that the challenged instruction merely told the jury that it "may consider" the multiple wounds as adequate evidence of premeditation, but the instruction did not limit the jury's consideration of all of the evidence when applying the definition of premeditation.

Further, the proposition which appellant distills from the cases cited by him is contrary to Maryland law. The intervals between the stab wounds inflicted on Mr. Bernstein evidence sufficient time for reflection and decision. See *Ferrell v. State*, 394 Md. 679, 684, 500 A.2d 1070, 1072-73 (1965); *Colvin v. State*, 299 Md. 98, 109, 472 A.2d 953, 963-64 (1964); *Hyde v. State*, 258 Md. 309, 216-17, 179 A.2d 421, 424-25 (1962); *Cummings v. State*, 223 Md. 606, 611-12, 165 A.2d 896, 898-99 (1960); *Kier v. State*, 216 Md. 513, 522-23, 140 A.2d 896, 900 (1958); and *Chisley v. State*, 202 Md. 87, 106-09, 95 A.2d 577, 585-87 (1953).

Finally, the evidence of premeditation in the instant case is not limited to the multiple wounds. Mr. Bernstein was stabbed when his hands were tied behind his back, and Booth admitted to Mr. Mazyck that the people were killed because they knew Booth and his nephew.

## V

161 Booth contends that the evidence was legally insufficient to support his conviction for conspiracy to rob. The principle which appellant says applies here is that there must be, in addition to evidence of the commission of a robbery, evidence that a meeting of minds occurred prior to the commencement of the robbery. Here no witness testified to what transpired between Booth and Reid prior to, or



at the time of, the first entry into the Bronteins' home in the late afternoon or early evening of May 2, 1982.

Booth's argument is fully answered by the statement of facts which opens this opinion. The direct evidence in that by 9:00 p.m. on the day of the murders Booth and Reid were at Ms. Maryck's apartment with loot from the Bronteins' home and that they planned to return there with a licensed driver in order to use the Bronteins' car to haul away more loot. This evidence supports the reasonable inference that Booth and Reid were acting in concert during the initial entry when the robberies of Mr. and Mrs. Brontein occurred. From the standpoint of conspiracy to rob it is immaterial whether the robberies committed during the first entry are viewed as fully consummated crimes or merely as the earlier phase of continuing robberies which concluded when Booth *et al.* returned to the Bronteins' home later that night.

Another inference, theoretically consistent with the direct evidence, would be that Booth and Reid met coincidentally at the Bronteins' home at the time of the earlier entry and commenced separate robberies acting independently of each other. That alternative is absurd.

#### VI

(17.8) During jury selection appellant objected to the disqualification of potential jurors who expressed opposition to the death penalty. He also expressly requested that two jurors be impaneled, one to determine guilt or innocence which would include opponents of the death penalty, and another to determine sentence if that were to become necessary. There was no error in excluding prospective jurors opposed to capital punishment or in refusing to impanel separate jurors. The arguments advanced by Booth here were fully considered and rejected on the merits in part I B of our recent opinion in *Foster v. State*, 304 Md. 439, 453-66, 499 A.2d 1236, 1243-51 (1985).

Direct evidence is the evidence that is attributable to actual knowledge of a fact such as an eyewitness. Circumstantial evidence is that which proves the facts indirectly or facts and circumstances from which an inference may arise. The law makes no distinction between direct and circumstantial evidence. No greater degree of certainty is required of circumstantial evidence than direct evidence since in either event you must be convinced of the defendant's guilt beyond a reasonable doubt.

You are further instructed that in a criminal case the defendant is entitled to every inference which can reasonably be drawn from the evidence and where two inferences can be drawn from the same evidence, one consistent with guilt and one consistent with innocence, the defendant is entitled to the inference which is consistent with his innocence.

#### Issues Relating to Sentencing

##### VIII, IX and X

Appellant's eighth, ninth, and tenth contentions will be considered together because they involve the exercise by Booth of the right of allocution in capital cases conferred by Maryland Rule 4-343. Subsection (d) provides: "Allocution.—Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement."

After Booth had been found by the jury to be guilty of Mr. Brontein's murder, that same jury sat to determine whether his sentence should be life imprisonment or death. The State's case at the sentencing phase consisted entirely of the pre-sentence investigation report and the victim impact statement. After nonparty witnesses for the defense had testified, Booth and his counsel approached the bench. Counsel repeated on the record advice previously given Booth concerning his right to testify. Counsel told Booth that if he decided not to testify he still had "the right to allocate," which was explained as "the right to tell the jury

#### VII

In its instructions to the jury at the guilt or innocence phase the trial court had included the following paragraph.

The general rule is that there is an inference of guilt which arises from the possession of recently stolen property. Upon proof of the corpus delicti, the inference is strong enough to establish the criminal agency of the possessor of such goods and thus to sustain the conviction. If a robbery with a dangerous and deadly weapon is proved to have been recently committed, the inference is that the possessor of goods taken during its commission was the robber.

Booth submits that by saying "the inference is" the trial court improperly converted an inference into a presumption because only presumptions can be stated as existing where as inferences exist only if and when the trier of fact has chosen to find them.

(18) This point has not been preserved for appellate review. Maryland Rule 4-325(e) provides that "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record . . . stating distinctly the matter to which the party objects and the grounds of the objection." In the instant case the trial judge prepared his instructions in writing and gave counsel the opportunity to review and to take exceptions to them in advance of his reading them to the jury. Booth did not except to that portion of the charge of which he now complains.

(19) Furthermore, were the matter properly before us, we would hold that there was no prejudicial error in light of the charge as a whole. The trial judge instructed the jury generally on inferences in a portion of his charge which preceded, and which was separated by only two paragraphs from, the paragraph in which Booth now claims error lies. The general charge read:

There are two types of evidence which the jury may consider in this case, direct or circumstantial evidence.

why you feel they should not execute you." Counsel said that the court would instruct the jury that Booth's failure to testify could not be held against him, but when counsel asked the court to confirm the legal accuracy of that statement the judge replied: "No, I don't believe that's accurate. That only held true for the guilt or innocence phase of this trial." The court said it was "directly up to Mr. Booth whether he wants to testify or not at this point. Nothing will be said to the jury about that." After further discussion the court agreed with Booth's request that he be allowed to consider the matter overnight and advise of his decision the following morning.

The next morning Booth said that he would not testify but that he would allocate. At the court's request Booth explained the difference in his own words.

Well, if I testify, I would be subject to cross-examination by the counsel for the State and if I allocate, I can't be cross-examined—well, I won't be cross-examined.

THE COURT: All right. Did—you will make an argument to the jury concerning whatever you want to say to the jury, is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: All right. You understand that you will not be under oath and you will not be examined by anyone as to what you say to the jury?

THE DEFENDANT: Yes sir.

The jury was then brought into the courtroom and told by the judge that "the defendant has the right to address you and say whatever it is he wishes to say to you concerning the matters that you are going to be deliberating on." Booth, who had elected not to testify at the guilt or innocence phase, opened his statement to the jury by saying that "I finally got a chance to say something to you." In his address, which transcribes to seven and one-half pages, Booth denied killing anyone. He admitted only to having entered the Brontein home late in the evening, after the murders had been committed, in order to steal. He al-

tacked the prosecution for fabricating statements of witnesses and putting words in their mouths. He said his general occupation was being a thief but he was not a robber or murderer.

In its summation the State told the jury, over objections by defense counsel, that Booth's statement was not evidence, that Booth, in order to avoid cross-examination, had not taken the witness stand, and that Booth had lied to the jury and should not be believed.<sup>4</sup>

5. The relevant portion of the State's argument reads:

[DEFENSE COUNSEL:] Objection, your Honor.

THE COURT: Overruled.

[STATE'S ATTORNEY:] Remember what the Judge told you, I believe in his very first statement to you, evidence is three things. It is stipulations, that which counsel agrees to be fact, it is documents or pictures or actual objects placed into evidence and it is testimony under oath subject to cross-examination from the witness chair. What you heard this morning was John Booth in his right of allocation. Something did occur that testimony. For the law provides that any man before he is sentenced can say anything that is on his mind. But anything that is on his mind is not an elevated level of evidence.

[DEFENSE COUNSEL:] Objection, your Honor.

THE COURT: Overruled.

[STATE'S ATTORNEY:] There is but one reason John Booth did not take the witness stand and present his story as he told it to you in allocation. I'm not so naive a man to believe Mr. Booth would be so moved by the prospect of an oath that he would not break his oath. But, ladies and gentlemen, he stood here and testified, not under oath, for one reason only, to avoid cross-examination.

[DEFENSE COUNSEL:] Objection, your Honor.

THE COURT: Overruled.

[STATE'S ATTORNEY:] I assure you we had some questions for Mr. Booth. I ask you, don't be confused by this con man, don't be confused by this man who travels with fifteen names, don't be confused by a most accomplished liar.

But, even though we had no cross-examination, even though we couldn't ask the man one question—

[DEFENSE COUNSEL:] Objection.

THE COURT: Overruled.

[STATE'S ATTORNEY:] —the lies stated through his statement. He just wants, for all his talents, a con man. He just wants to cheat you a lie. Do you realize what he has actually said to you?

In his brief to us Booth argues that the trial court erred (a) in allowing the State to argue that Booth's "allocation was not evidence to be considered by the jury," (b) "in permitting the prosecutor to comment on appellant's failure to testify at his capital sentencing proceeding," and (c) "in refusing to instruct the jury that it could not draw any inference adverse to appellant from his failure to testify during the sentencing proceeding." Before we can address these specific assignments of error, we must explore the nature of the "allocation" here involved.

After January 1, 1979, and prior to the revision of the Maryland Rules effective July 1, 1984, there was no rule applicable to allocation in capital cases. There was, however, an allocation rule applicable to noncapital cases, for now Rule 772 d. At the Rules Committee meeting of October 15/16, 1982, a member proposed that the allocation rule apply to capital cases as well. Minutes of the committee reflect that certain benefits of such a change were discussed. Those were the opportunity for the defendant "to make a statement in favor of imposition of a sentence of life imprisonment as opposed to death" and that, because in a court sentencing in a capital case a judge would likely never refuse a request by the defendant to make a statement, the absence of a provision for allocation before a jury in capital cases might raise constitutional questions. A burden to be anticipated from the proposal one member pointed to the existing complexity of capital cases while the

The prosecution then argued from the content of Booth's statement that Booth had contradicted himself on each of two aspects of the allocation. Continuing, counsel for the State said:

Ladies and gentlemen, he could have said anything that he wanted when he stood here before you. Anything. The one thing he did not say is this, I am sorry for what I have done. For I submit, he is not and in the final analysis, with his life on the line, not subject to cross-examination—

[DEFENSE COUNSEL:] Objection, your Honor.

THE COURT: Overruled.

[STATE'S ATTORNEY:] —He has attempted once again to lie his way out of his problems. Please, please do not be so naive as to let him do that.

chief of the Criminal Division of the Attorney General's Office anticipated concerns in State's Attorneys' offices "about unknown statements being made by the defendant immediately prior to the jury's retiring to consider its verdict." The Rules Committee then voted to recommend to this Court that the rule applicable to noncapital cases be amended as follows (brackets indicate matter to be deleted and italics indicate matter to be added to the text of former Rule 772 d, then tentatively renumbered Rule 4-702(d) in the Committee's working draft for the rules revision project):

Before imposing sentence, the court shall [inform] of [to] the defendant [that he has the right] (the opportunity, *to*, personally and through counsel, to make a statement, and to present information in mitigation of punishment), and the court shall afford an opportunity to exercise the right).

That recommendation is now Rule 4-342(d).

The Committee also decided to make the amended allocation rule applicable to capital cases, with the further deletion of the provision for presentation of information in mitigation of punishment. That recommendation is now Rule 4-342(d).

The *obvious* purpose of Rule 4-342(d) is to afford the death penalty eligible, convicted murderer the opportunity to make an sworn statement in mitigation of the death penalty without being subject to cross-examination. In this respect the statement is similar to closing argument, but it is not completely analogous to closing argument because the factual content of the allocation is not limited, in general, to the record in the case, inferences therefrom, and matters of common human experience. In that allocation is sworn and is not subject to cross-examination, it is not testimony in the conventional sense. Nevertheless, *allocations* may be reviewed by the sentencing authority. Under Md. Code (1992, 1992 Repl. Vol., 1995 Cum. Supp.), Art. 27, § 413(g)(8) the sentencing authority may find by the preponderance of the evidence that "by other facts which the [sentencing au-

thority] specifically sets forth in writing that it finds an mitigating circumstances in the case." In Booth's case, after the jury had found the aggravating circumstance of murder in the course of robbery, the jury was free to find as a mitigating circumstance such aspect of the content of Booth's allocation on which the jury could unanimously agree, simply by specifically setting it forth on the sentencing form. Further, if the jury found any such mitigating circumstance in the allocation the jury was obliged to weigh that mitigating factor in determining whether the sentence should be life or death.

(11) Within the bounds of permissible jury argument the prosecutor's summation honored the principles discussed above. Counsel for the State contrasted Booth's allocation with the elevated level of evidence which is sworn testimony subject to cross-examination. The record does not factually support Booth's contention that the prosecutor told the jury that it could not consider Booth's allocation. Indeed, the entire thrust of the argument objected to by Booth was a recognition by the State that the jury *could* consider the content of Booth's statement to be true, but that the jury should not.

(12) Among the reasons given by the State why the jury should reject as false the content of Booth's allocation was that it was unsworn and was not subject to cross-examination. Because the content of a convicted defendant's allocation may be considered by the jury or court in mitigation, the State, as a matter of nonconstitutional Maryland law, may comment on that allocation and urge its rejection by arguments which may include attacking the defendant's credibility by explicit reference to the lack of an oath and to the lack of testing by cross-examination.

Booth further submits that such comment violates his Fifth Amendment' protection against compulsory self in-

6. All statutory references, unless otherwise noted, will be to Art. 27.



crimination because it is also a comment on Booth's failure to testify at the sentencing proceeding.

Appellant's argument assumes as its major premise the applicability here of the rule in *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1228, 14 L.Ed.2d 106 (1965). After *Mallory v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) had held that the Fifth Amendment prohibition against compulsory self-incrimination was applicable to the states through the due process clause of the Fourteenth Amendment, *Griffin* held that references by a California court and prosecutor to *Griffin's* failure to testify violated the United States Constitution. The case was a two-stage death penalty trial. *Griffin* had not testified at the guilt or innocence stage. The court had instructed the jury that it could take into consideration on the issue of guilt *Griffin's* failure to deny or explain evidence which he would reasonably be expected to deny or explain because of facts within his knowledge. In argument the prosecutor had enumerated aspects of the case which the defendant had not seen fit to explain or deny by taking the stand. Such comment on the refusal to testify was held to be "a penalty imposed by courts for exercising a constitutional privilege [which] runs down on the privilege by making its assertion costly." *Id.* at 614, 85 S.Ct. at 1232-33, 14 L.Ed.2d at 109-10.

113, 141 The right is also infringed where the government elicits an examination of the defendant at a second retrial that the defendant had not testified at the prior trial. *See Stewart v. United States*, 366 U.S. 1, 81 S.Ct. 941, 6 L.Ed.2d 84 (1961). Nor is a procedure constitutional by permissible which requires the defendant to testify as the first witness in the defense case or not at all. *Brooks v. Tennessee*, 406 U.S. 606, 92 S.Ct. 1891, 32 L.Ed.2d 738 (1972). In *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), the Court held that a defendant who had not testified was entitled, upon request, to an opportunity to testify by charges not to testify, could not be used

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as an inference of guilt and should not prejudice him in any way. The Court reasoned that

[j]ust as adverse comment on a defendant's silence "cuts down on the privilege by making its assertion costly," [*Griffin*, 380 U.S.] at 614 [85 S.Ct. at 1232] the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege. [450 U.S. at 305, 101 S.Ct. at 1121, 67 L.Ed.2d at 254.]

Even though such an instruction calls attention to the failure of the defendant to testify there is no Fifth Amendment violation in a court's giving the instruction without request because the instruction is not adverse to the defendant and "cannot provide the pressure on a defendant found impermissible in *Griffin*." *Lakeside v. Oregon*, 436 U.S. 233, 239, 98 S.Ct. 1091, 1095, 55 L.Ed.2d 319, 325 (1978).

It has also been determined that at least certain aspects of the privilege against compulsory self-incrimination apply to one who invokes the privilege after that person has been found guilty and before sentencing. We have held that one who had pled guilty but who had not yet been sentenced could not be compelled to be a witness at the trial of a co-defendant on the same charges. *Smith v. State*, 263 Md. 197, 300 A.2d 529 (1978), cert. denied, 439 U.S. 1130, 5 S.Ct. 1669, 59 L.Ed.2d 92 (1978). The Supreme Court has also addressed an aspect of the Fifth Amendment right arising out of the sentencing phase of a two-phase capital murder trial in Texas. Texas law requires finding future dangerousness, *inter alia*, before imposing a death penalty. In *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1668, 68 L.Ed.2d 319 (1981), the accused, while confined in jail on the murder charge, had submitted to a pretrial psychiatric examination informally ordered by the trial judge to determine the accused's capacity to stand trial. The psychiatrist did not give any *Miranda* warnings. The state used the defendant's statements against him in the sentencing proceedings. This was held to violate the *Miranda* rule. Answering

contentions that incrimination was complete once guilt had been adjudicated and that the Fifth Amendment privilege had no relevancy to the penalty phase of a capital murder trial, the Court said:

We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees. Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment. Yet the State's attempt to establish respondent's future dangerousness by relying on the unsworn statements he made to [the psychiatrist] similarly infringes Fifth Amendment values. [451 U.S. at 462-63, 101 S.Ct. at 1873, 68 L.Ed.2d at 309 (footnotes and citations omitted).]

115) In the case before us *Booth* combines the *Griffin* prohibition against adverse commentary on silence and the *Pattile* recognition that there can be self-incrimination after a finding of guilty to urge that the prosecutor's jury argument at his sentencing violated his Fifth Amendment right. *Booth's* contention ignores the fact that he did not remain silent and that the prosecutor's comments were directed at *Booth's* allegation. When more bluntly stated *Booth's* argument is that the law must pretend that he remained silent because §§13 R. 4-34(b) benefited him by allowing him to make for the jury's consideration a statement which was unknown and not subject to cross-examination. We will not encourage this state's prohibition against self-incrimination to incorporate such a fiction.

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116) The remaining question is whether the prohibition against compulsory self-incrimination in the Fifth Amendment to the United States Constitution, as applicable to Maryland through the Fourteenth Amendment, imposes a contrary rule. We assume that, if *Booth* had neither testified nor altered at the sentencing phase, the *Griffin* rule would continue to apply. Further, if *Booth* had testified under oath and subject to cross-examination at his sentencing he would have waived the Fifth Amendment privilege. *Cf. Cameretti v. United States*, 242 U.S. 470, 37 S.Ct. 19, 61 L.Ed. 442 (1917) (testimony by accused at unitary trial is a waiver). *Booth's* allegation is more like testimony than silence and for Fifth Amendment purposes is testimonial, carrying with it, at a minimum, a waiver of any privilege to avoid comment by the prosecutor on the allegation.

Although the Supreme Court seems not directly to have addressed this problem, considerable light is cast on it by a capital case from this reported with *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), *reversed on other grounds*, 408 U.S. 941, 92 S.Ct. 2873, 33 L.Ed.2d 765 (1972).<sup>6</sup> Under the then (this procedure the decision on guilt or innocence and, if guilt, the jury role in sentencing were accomplished in one proceeding. Unless the jury, when returning a verdict of guilty of murder, also recommended mercy, a death sentence was automatic. The defendant contended that this procedure placed unrealistic pressure on him to testify because, if he remained silent with respect to guilt or innocence, as he had done, he suffered imposition of the death penalty without the jury

<sup>6</sup> A prison may not be compelled to testify in violation of his privilege against self-incrimination. The failure of a defendant to testify in a criminal proceeding on this basis does not create any presumption against him.

<sup>7</sup> The judgment of the Supreme Court of this case was vacated under an act which the death penalty undisturbed. The case was remanded for further proceedings in light of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2719, 33 L.Ed.2d 346 (1972).

<sup>8</sup> Article 13 of the Maryland Declaration of Rights provides: "[n]o man ought to be compelled to give evidence against himself in a criminal case." *Procureur v. Arledge* provides:

ever having heard him speak in mitigation of that punishment. The Court did "not think that Ohio was required to provide an opportunity for petitioner to speak to the jury free from any adverse consequences on the issue of guilt." 402 U.S. at 220, 91 S.Ct. at 1474, 28 L.Ed.2d at 734. A fortiori, Maryland is not required, when it provides an opportunity for the person found guilty of capital murder to speak to the jury in mitigation of sentence, to make that allocation free from any adverse consequences on the issue of sentence. Having the State argue that allocation is unworn, not subject to cross-examination, not evidence, and not to be believed is not as adverse as the procedure which passed constitutional muster in *McGautha*.

The issue now before us was presented in a highly analogous format in *Jones v. State*, 381 So.2d 993 (Miss.), *cert. denied*, 449 U.S. 1003, 101 S.Ct. 543, 66 L.Ed.2d 300 (1980). The Mississippi constitution guarantees an accused the right to argue his case to the jury. *Jones* was a two-stage capital murder prosecution. The defendant had not testified on guilt or innocence but elected to argue at the sentencing phase. In his "argument" he told the jury, as facts, matters which were not in evidence. The prosecutor objected on grounds, apparently expressed in the presence of the jury, which included the following:

"That's testifying and there's no way to contradict that and it's not fair, Judge, if he doesn't take the stand and let the State cross examine him on this but to stand up here and to be able to do something that the State does not have a right to cross examine him on is not proper.... The State didn't have a right to call him, Judge. We couldn't put him on the stand. [381 So.2d at 998.]

The Supreme Court of Mississippi ruled that the state constitutional right to argue and the rights of the accused under *Griffin*

create a conflict which requires a defendant to make a choice. If he chooses to argue his case to the jury and at the same time invokes the Fifth Amendment, he must confine his remarks to the evidence in the record. The

Fifth Amendment privilege against self-incrimination is a shield, not a sword. A criminal defendant who takes advantage of his right to argue his case to the jury must not be permitted to say all the things he might have testified to had he chosen to call himself as a witness. When he does so, he will be deemed to have waived the right not to have his failure to take the stand commented upon. [381 So.2d at 993.]

And further:

The practical solution to the dilemma presented by the accused who uses his constitutional right to argue his case to the jury to give, what is for all practical purposes, testimony is to treat the unworn testimonial statements of the accused which were not supported by the record as a partial waiver of the privilege against self-incrimination. It is not a total waiver of the privilege, since the prosecution is unable to cross-examine the accused at this late stage of the trial. But the prosecution may comment to the jury that the defendant's statements were not given under oath and that he was not subject to cross examination about them. [Id.]

*Williams v. State*, 445 So.2d 798 (Miss.1984), *cert. denied*, — U.S. —, 105 S.Ct. 803, 83 L.Ed.2d 795 (1985) held that, unlike *Jones*, *supra*, there was no waiver where the defendant's opening statement at a capital sentencing hearing asserted self-defense which was already in evidence, albeit not in detail, via admissions related by police witnesses.

At the trial resulting in the conviction attacked in *State v. Bontempo*, 170 N.J.Super. 220, 406 A.2d 203 (1979), a post-conviction case, the presiding judge had departed from applicable procedure and allowed the accused who had not testified to make an unworn statement to the jury in addition to the argument by counsel for the accused. In rebuttal the prosecutor emphasized to the jury that the defendant's statement was not under oath, was not subject to cross examination, and had omitted explaining aspects of

the evidence against him. To support post-conviction relief Bontempo relied heavily upon *Griffin*. After reviewing many of the cases cited *infra*, the New Jersey court summed up by saying that

the rationale underlying the decisions cited compels the conclusion that defendant's testimonial behavior before the jury justified the prosecutor's rebuttal. Where, as here, a defendant's unworn statements take on a "testimonial" color, the jury might well be misled. The accused thereby "gather[s] an advantage that is false, far less than the whole truth may affirmatively mislead." *State v. Fioravanti*, [46 N.J. 109, 118, 215 A.2d 16, 21 (1965), *cert. denied*, 384 U.S. 919, 86 S.Ct. 1365, 16 L.Ed.2d 440 (1966)]. Thus, a defendant who "undertakes to answer part of the evidence against him [in a testimonial manner] is subject to comment as to factual thrusts he does not meet." *Id.* at 117, 215 A.2d at 20. Here, the prosecutor's comments constituted proper rebuttal and did not serve to violate defendant's Fifth Amendment rights. [170 N.J.Super. at 244-45, 406 A.2d at 215.] Subsequently, the United States District Court for the District of New Jersey granted Bontempo the writ of habeas corpus but the Third Circuit reversed. *Bontempo v. Fenton*, 692 F.2d 954 (1982), *cert. denied*, 460 U.S. 1055, 103 S.Ct. 1506, 75 L.Ed.2d 935 (1983). The Third Circuit held:

The circumstances here were unusual. The jury was told that Bontempo's argument could not be considered as evidence and yet he talked about facts which were not in the record. The prosecutor's comments about those unworn accounts and about Bontempo's failure to mention other relevant events was fair reply to the unorthodox closing argument. The jury's attention had been focused on the facts mentioned in the closing argument, despite the instruction that they were not evidentiary. The prosecutor was not prohibited from recognizing the reality of the situation and answering Bontempo's narrative. We are not persuaded that in so doing the prosecution did

comment on Bontempo's failure to testify. Consequently, *Griffin* is not applicable. [Id. at 959.]

The problem under consideration has also arisen at trials on guilt or innocence where the accused, appearing pro se, gives unworn testimony, not subject to cross-examination, in the course of purportedly questioning witnesses or purportedly arguing from the record. For example, in *United States ex rel. Miller v. Follette*, 278 F.Supp. 1003 (E.D.N.Y. 1968), the petitioner for a writ of habeas corpus complained that at his trial, in which the petitioner had acted as his own attorney, the prosecutor had told the jury in summation that he could not comment upon the accused's failure to take the stand but that the jury should listen closely to the court's charge as to what constituted evidence. Using both a waiver and a harmless error analysis, the petitioned court rejected the contention that petitioner's Fifth Amendment rights as defined in *Griffin* had been violated. It said:

The law is presented with a dilemma. On the one hand, permitting defendant to defend himself without benefit of a lawyer's skills and objectivity may lead him to make statements which can be construed as a total waiver of his privilege against self-incrimination, exposing him to being called by the state. On the other, were defendant allowed to give, what is for all practical purposes, testimony without being subject to some check, the jury might be misled. Faced with such undesirable alternatives, the law seeks a middle ground which accommodates the essence of the opposing interests while furnishing maximum protection to all concerned.

Treating the unworn testimonial statement of the defendant as a partial waiver of the third aspect of the privilege against self-incrimination [i.e., freedom from adverse comment] provides a practical solution. The prosecution can then be permitted to comment that the defendant's statements were not given under oath while he was subject to cross examination and that they are, therefore, less weighty than sworn testimony. The constitutional privilege of the criminal defendant appearing



pro se would appear to be adequately protected were he given a clear and direct warning by the court that such limited comment might follow if he continued to give what amounted to unsworn testimony. [*Id.* at 1007.] The Second Circuit affirmed on the harmless error ground, 397 F.2d 363 (1968), and certiorari was denied, 393 U.S. 1039, 89 S.Ct. 660, 21 L.Ed.2d 585 (1969).

In that appeal the prisoner, Miller, relied upon an earlier, two-one decision of the Second Circuit in *United States v. Curtiss*, 330 F.2d 278 (1964). *Curtiss* held that the unsworn and outside-of-the-record excuses given by a pro se defendant for his income tax deficiencies did not constitute a waiver of Fifth Amendment protection and that the prosecutor had violated that protection by arguing that government witnesses had been sworn "but the defendant stood down here and he asked a lot of questions." [*Id.* at 281 (emphasis omitted)]. Dissenting in *Curtiss*, Judge Medina observed:

We have come to a pretty pass if, acting as his own lawyer, a defendant in a criminal case can go ahead and say as a lawyer the things he could have testified to in his own defense, and then accuse the prosecutor of violating his Fifth Amendment rights when the prosecutor tells the jury not to believe him, but rather to render their verdict on the testimony given under oath by the witnesses who did testify. [*Id.* at 287.]

When *Miller v. Follette* reached the Second Circuit that court emphasized that Miller himself had referred to his failure to take the stand so that, "under those circumstances, to regard the prosecutor's restrained remark as an error of constitutional proportions would glorify technicality." 397 F.2d at 367. Absent Miller's own reference, the Second Circuit recognized that it "would be faced with the question of whether *Curtiss* should be reconsidered." *Id.*\*

\* In *United States v. Kaufman*, 429 F.2d 240, 246 (1970), the Second Circuit said in dictum that in the event that some of the pro se

If you use his choice not to testify in any manner, you will have violated your oath that you have taken as jurors.

The trial judge had advised counsel that the above instruction, as well as two others requested by Roeth, would not be given. In charging the jury the trial judge did not comment at all on the effect, if any, upon the jury's deliberations of Roeth's having allocated but not testified. Defense counsel's sole exception to the charge was based on the court's "failure to give our requested instructions in full, in the way they are written."

Appellant's requested instruction No. 17 "in the way [it was] written" was properly denied. It presupposed that Roeth had remained silent when Roeth had in fact allocated.<sup>11</sup> To give the instruction in the form requested would have been confusing and an incorrect statement of law under the circumstances here. In his allocation Roeth denied having murdered Mr. Brunstein. The jury had just found beyond a reasonable doubt that Roeth had murdered Mr. Brunstein with premeditation. The jury could properly consider, from the allocation, that Roeth had not remorse and thereby reduce the weight to be given to the mitigating factors which the jury had found did exist.

#### XI

[18] Under the heading of his eleventh submission Roeth collects three instances in which he claims there was trial court error in some way associated with claimed improper final argument by the prosecutor at the sentencing proceeding. The permissible scope of closing argument is a matter left to the sound discretion of the trial court. The exercise of that discretion will not constitute reversible error unless

11. Roeth relies heavily on *People v. Ramirez*, 98 Ill.2d 419, 75 Ill. Dec. 241, 653 N.E.2d 11 (1995) which held that one who had been found guilty of capital murder was entitled to a *Carver v. Kentucky* instruction on the life or death sentencing hearing. In that case, however, the defendant had remained silent at the sentencing hearing.

*Curtiss* represents what is definitely the minority position. Most courts which have considered the question hold that the Fifth Amendment does not prohibit comment by a prosecutor on unsworn statements of fact made by a pro se defendant. See *United States v. Lacob*, 416 F.2d 756 (7th Cir.1969), cert. denied, 396 U.S. 1059, 90 S.Ct. 755, 24 L.Ed.2d 754 (1970); *Redfield v. United States*, 315 F.2d 76 (9th Cir.1963); *Smith v. United States*, 234 F.2d 385 (5th Cir.1956); *State v. Schultz*, 46 N.J. 254, 216 A.2d 372, cert. denied, 394 U.S. 919, 96 S.Ct. 1367, 16 L.Ed.2d 439 (1966); *State v. Polk*, 5 Or.App. 606, 495 P.2d 1241 (1971); *State v. Johnson*, 121 Wis.2d 237, 358 N.W.2d 824 (1984) (no violation by comment that pro se defendant's opening statement was not followed up with proof). And see Note, *Criminal Law—Privilege Against Self-Incrimination—Comment on Failure of Accused Appearing Pro Se to Testify*, 38 Temple L.Q. 102 (1964).

We hold that the State's argument did not violate Roeth's Fifth Amendment rights.

[17] The third aspect presented here of the right to remain silent is Roeth's claim that the trial court erred in rejecting his proposed instruction No. 17. It read in relevant part:

Every citizen charged with a crime has the right to remain silent at trial, including the sentencing hearing. This is because it is the prosecutor's responsibility at a sentencing to prove the citizen guilty of an aggravating circumstance beyond a reasonable doubt.... Mr. Roeth did not testify in this phase, as was his right. You shall not draw any inference of guilt from this choice. You shall not allow this choice to prejudice him in any way.

defendant's statements "might be construed as testimony he may have waived his right to refuse to testify."

10. This case was on direct appeal when *Gaffin v. California* was decided in 1965.

clearly abused and prejudicial to the accused. See *Thomas v. State*, 301 Md. 294, 316, 493 A.2d 6, 17 (1984).

#### A.

[19] The presentence investigation report, introduced as a joint exhibit at the sentencing hearing, referred to Roeth's sentence on May 21, 1972, to three years confinement for assault with intent to maim. That sentence was to be served consecutively to a sentence of four years imposed on May 21, 1971, for robbery. The section on Roeth's institutional history explained that "while incarcerated at the Maryland Correctional Institution, Roeth stabbed a fellow inmate, resulting in a consecutive three year sentence for Assault with Intent to Maim imposed on 5/21/72." The presentence report also referred to a November 28, 1978, sentence of five years by the Criminal Court of Baltimore for assault with intent to maim. The employment history section of the report advised that

[b]etween his 9/77 release and his 6/78 arrest for Assault with Intent to Maim, the defendant was employed briefly as a painter for one Robert Shrwer. It was this employer whom the defendant assaulted, reportedly prompted by unpaid wages, which led to Roeth's five year sentence on 11/28/78. This information was obtained from Roeth's 1978 Admission Summary—Institutional file.

In the course of argument the prosecutor said:

Let me explain to you what maim is. It is an ancient crime and the definition of maiming is doing something, hurting somebody in a way in which they would no longer be of service to the king. Maiming means disfiguring somebody, cutting off an ear, gouging out an eye, cutting off a hand. I submit to you, ladies and gentlemen, that short of death, it is the ultimate crime of cruelty.

At that point defense counsel objected, without stating any reasons. The objection was overruled. On this appeal Roeth argues that the prosecutor misstated the law and was describing mayhem in his argument.



There was no error. Codified under the "Maiming" subtitle of Md. Code (1987, 1982 Repl. Vol.), Art. 27, "Crimes and Punishment," are §§ 384-386. The convictions of assault with intent to maim referred to in the presentence investigation report were undoubtedly based on violations of § 386 which in relevant part provides that

[i]f any person . . . shall assault or beat any person, with intent to maim, disfigure or disable such person . . . every such offender . . . shall be guilty of a felony . . . Section 386, however, does not define "maim." The specific conduct which constitutes the substantive statutory offense of maiming is set forth in § 385 which deals with the crime of cutting out or disabling the tongue, putting out an eye, slitting the nose, cutting off or hitting any nose, ear or lip, or cutting or biting off or disabling any limb or member of any person, of malice aforethought, with intention in so doing to mark or disfigure such person . . .

An assault with intent to maim is an assault perpetrated with the intent to inflict one or more of the injuries described in § 385. The prosecutor's definition of maiming virtually paralleled the words of the statute. Consequently, if defense counsel's objection was based on a claimed misstatement of law by the prosecutor, there was no error in overruling the objection.

The objection more likely went to the last sentence above quoted from the prosecutor's argument which characterized maiming as the ultimate crime of cruelty, short of death. We see no abuse of discretion. We have said that counsel in argument "may indulge in oratorical conceit or flourish." *Wilhelm v. State*, 272 Md. 404, 413, 326 A.2d 707, 714 (1974).

## R

As the final witness at the sentencing phase, counsel for Booth called a Roman Catholic priest, Father Thomas Schindler, an accurate professor at St. Mary's Seminary in

Baltimore where he teaches Christian ethics. The trial judge had conducted a preliminary hearing, outside of the presence of the jury, to determine whether Father Schindler could testify. He was offered as an expert on making ethical judgments. According to Booth's counsel the expert opinion would be offered on "the morality of this situation, the ethics of Mr. Booth and how that should play into an ethical decision-making scheme." The court ruled that Father Schindler "will be permitted to testify within the confines that [defense counsel] has just outlined."

Before the jury Father Schindler testified in substance that moral decisions are made on two fundamental bases, one philosophical and the other religious. The philosophical basis reasons from a criterion of what is right and wrong to an application in a particular situation. The religious basis draws on one's religious background and the commitments of one's particular faith. Based on an interview with Booth, on the presentence investigation, and on Booth's social services record, the witness was of the opinion that, while Booth "knows the golden rule" he "basically makes decisions much as a child would." Father Schindler also told the jury that

we have to take a Christian approach to things. In other words, try to understand from a faith commitment: Christian what has always been underscored is that in order to have full justice, it is always necessary that justice be tempered by or shot through with love and mercy.

On cross-examination the State developed, *inter alia*, that the witness had been contacted to testify after the guilty verdict had been rendered and within the preceding week to ten days, and that the interview with Booth had lasted approximately fifty minutes. The witness had never previously testified in a capital case and had never seen the sentencing form. On cross-examination the witness was also asked the following:

Q. Now, Father, when you were contacted, did you know that the defense had asked each [prospective] juror their religion?

A. No. I did not know that.

Q. You didn't?

A. No. I did not.

There was no objection by trial counsel for Booth to the above questions.

[20] In the course of the State's summation at the sentencing stage, the prosecutor reviewed the evidence, or lack thereof, as to each mitigating factor listed in the capital punishment statute. In connection with the eighth, or open-ended, factor he discussed Father Schindler's testimony. During that phase of its argument the State referred to the questions asked jurors on voir dire about their religion and to a Catholic priest's having been "recruited" after the guilty verdict. Appellant argues these comments were an improper attack on defense trial counsel. We find no abuse of discretion. The portion of the argument complained of, in the context of the argument as a whole, is part of an attack on Father Schindler's opinion evidence. Set forth in the margin in its entirety is that portion of the State's argument.<sup>17</sup> It was proper argument.

<sup>17</sup> The only evidence that you heard of what would really be considered a mitigating circumstance is the testimony of Father Schindler. Ladies and gentlemen, I think that it was embarrassing enough that we had this rank attack on your sentimentality—

[DEFENSE COUNSEL] Objection.

[THE COURT: Overruled.]  
[STATE'S ATTORNEY:] —By the defendant's grandmother. But particularly as a Catholic, I am horribly offended by the testimony—

[DEFENSE COUNSEL] Objection.

[STATE'S ATTORNEY:] —of Father Schindler.

[THE COURT: Sustain the objection as to counsel's personal feelings.]

[STATE'S ATTORNEY:] Ladies and gentlemen, my personal feelings have nothing to do with this. But realize each one of you, as all of the other jurors bonded or so jurors who were considered for this case, was asked a question by the defense attorneys, what is your religion and how various are your religious convictions.

## C.

[21] Booth also complains of the following passage from the State's argument:

[DEFENSE COUNSEL] Objection.

[THE COURT: Overruled.]

[STATE'S ATTORNEY:] Then after the defendant is convicted, a Catholic priest is gone out and recruited.

[DEFENSE COUNSEL] Objection.

[THE COURT: Overruled.]

[STATE'S ATTORNEY:] When? When? Last Thursday. He? This man for the first time and spent fifty minutes with him. No, he is capable of coming into this court and telling you how you are to ethically go about making the decision before you—

[DEFENSE COUNSEL] Objection.

[THE COURT: Overruled.]

[STATE'S ATTORNEY:] —How you are going to go about it ethically. The law provides a step by step method for you to go where you are supposed to go.

[DEFENSE COUNSEL] Objection.

[THE COURT: Overruled.]

[STATE'S ATTORNEY:] What does he tell us? He tells us really three things. First he tells us that from an ethical point of view, it is in some instances proper to take life. I think we all can understand that. He tells us that the death penalty should be a penalty of last resort. We didn't need an expert to tell us that because each one of us knew that. But what is it that he is telling here in this courtroom? He is telling, that is, his expert analysis indicates that this defendant, when he went into the Breckenstein home was suffering from an underdeveloped conscience, an underdeveloped moral ethical capacity. Ladies and gentlemen, that is ridiculous.

[DEFENSE COUNSEL] Objection.

[THE COURT: Overruled.]

[STATE'S ATTORNEY:] That ladies and gentlemen, is absurd. Certainly, some people may be more moral than others. I guess it's true. I guess he's [Booth's] a classic example of what he studies all the time. It is impossible for an adult human being, capable of speaking intelligently as you saw John Booth, it is impossible for him not to fully appreciate that it is wrong—

[DEFENSE COUNSEL] Objection.

[THE COURT: Overruled.]

[STATE'S ATTORNEY:] —to recruit one of your buddies, one of your dope addicted buddies to go down and break into your neighbor's home, old people, vulnerable people, available people, to overpower them, to tie them up, to gag them, to put a hood over Mr. Breckenstein's head and then to take a knife and stab and stab and stab here and say the defendant has an underdeveloped sense of moral capacity that should mitigate his involvement in this crime. It is ridiculous.

If we don't stand together against this crime—

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[STATE'S ATTORNEY]: If we don't stand together against this crime that this killer has committed, then as a community and a people, as a civilization, we stand for absolutely nothing because then we are a community that will not protect itself.

Appellant calls this an impermissible "fear tactic" and a suggestion that the jury transfer responsibility for their decision to the community at large. We see it as an argumentative presentation of the deterrence policy in sentencing. There was no abuse of discretion.

## XII

At sentencing Roeth called as his witness the Chairman of the Maryland Parole Commission, William Kunkel. He was asked when Roeth would be eligible for parole if a life sentence were to be imposed for the murder of Mr. Bronstein and if maximum sentences were to be imposed, to be served consecutively, for all other crimes of which Roeth stood convicted in the subject case.<sup>18</sup> Mr. Kunkel said that under current law Roeth would first become eligible in forty-five years, less diminution by credits, e.g., good behavior. This testimony was elicited without objection by the State.

In the course of cross-examination the following transpired:

Q. Can you explain a few other terms to me? What's the term ["work release"] mean?

A. The jury was not told that in another case Roeth stood convicted of another murder and robbery, committed on Easter Sunday, April 4, 1963. For those crimes Roeth had been sentenced to life plus twenty years. Those convictions were on appeal to the Court of Special Appeals at the time of the trial court proceedings in the instant matter. See *Roeth v. State*, 62 Md App 26, 499 A.2d 173, cert granted, 303 Md 297, 493 A.2d 353 (1985).

we said that "a jury consideration of the possibility of parole as such simply is irrelevant" in a capital sentencing proceeding. The rationale of *Poole* is applicable to the defense and to the prosecution. We recently so held in *Evans v. State*, 304 Md. 487, 499 A.2d 1261 (1985). There the defense likewise sought to show how far into the future possible parole would be if a life sentence were imposed. The theory of admissibility was that the proffered evidence was relevant to the statutory mitigating circumstance dealing with the unlikelihood of further criminal activity by the defendant that would constitute a continuing threat to society. We said that the trial judge in *Evans* was required to exclude the proffered testimony and pointed out "that one might be likely to engage in criminal activity constituting a threat to those around him whether he is confined in a penal institution or is on parole." *Id.* at 530, 499 A.2d at 1283 (footnote omitted).

124) In addition to our general duty under § 414(e) in capital cases to consider "any errors properly before [this] Court on appeal," we are also to consider under § 414(e)(1) "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." The State's introduction of evidence about work release was not prejudicial in that it did not render the sentencing proceedings unfair. The message which appellant was trying to give the jury through the direct examination of Mr. Kunkel was that Roeth would be in his sixties before he could ever be on the streets again, with the inference that by that time his hostility and viciousness should be burned out. Under *Poole* and *Evans*, that evidence was immaterial because persons in the prison community are part of "society" within the meaning of § 413(g)(7). By its cross examination the State, likewise by eliciting immaterial evidence, sought to correct a possible erroneous impression created by the immaterial testimony on direct, or at least to place that evidence in perspective. The State developed that parole is not the exclusive means by which an inmate can return to the streets so that, by necessary

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

Q. Are you familiar with the term?

THE COURT: Just tell us what it means.

A. Yes. I'm familiar with the term ["work release"].

The State thereafter developed from Mr. Kunkel, without objection, that there is a work release program in the correctional system under which an inmate is allowed to go into the community and work during the hours of employment, returning to the institution when not working. Permission of the Parole Board is not required for work release. These decisions are made by institutional authorities in the Department of Correction.

122) Roeth argues here that the overruling of his objection was erroneous and requires vacating the death sentence. There was no answer given to the question to which defense counsel objected. The question was reframed. The basis for the objection was not stated but it clearly appears that the prosecutor interpreted the objection as going to the competency of Mr. Kunkel to testify as to the meaning of "work release," when that program is not administered by the Maryland Parole Commission. The trial court, on the other hand, seems to have assumed that defense counsel was concerned that the witness would recognize the question to be preliminary and might launch into a general discussion. When the witness said he was familiar with the term, Roeth made no further objections to any part of the entire line of testimony on cross examination concerning work release. Absent objection error in the admission of evidence is not preserved for a review as of right.

123) The testimony from Mr. Kunkel about parole, adduced by appellant on direct, and about work release, adduced by the State on cross, was not relevant and should have been excluded if proper objections had been made. In *Poole v. State*, 295 Md. 167, 197, 453 A.2d 1218, 1233 (1983),

inference, parole does not exclusively control the time of any such return. From the standpoint of substantial fairness, the State's cross-examination was not improper. The technique which the State employed in meeting the improper evidence produced by Roeth is generally recognized and is formally known as the doctrine of curative admissibility. The theory underlying that doctrine is explained in 1 J. Wigmore, *Evidence in Trials at Common Law*, § 15, at 750 (Tiller's rev. ed. 1963).

The danger that the doctrine of curative admissibility is designed to meet is the danger that the jury will draw and use inferences with respect to immaterial matters, not that the jury will rely on unreliable evidence with respect to a material matter. If the latter concern were the true basis for the principle of curative admissibility, there would be no satisfactory reason to permit a counter-attack with respect to that material matter by the use of normally inadmissible evidence since, by hypothesis, the rebutting evidence (unless excluded for reasons of social policy) also lacks significant probative value and thus cannot—at least not if we believe in the truth-seeking functions of most of the exclusionary rules known as "relevancy rules"—rationally be expected to diminish the prejudice inflicted by the other party's incompetent evidence. Seen from this perspective, the requirement that the counterattack use evidence similar to that originally received is probably a rough and ready way of assuring that the counterattack addresses the immaterial issues raised by the inadmissible evidence originally submitted [Footnote omitted].

See also *McCormick on Evidence* § 57 (E. Cleary 3d ed. 1984).

There was no reversible error.

## XIII

125) Roeth submits that the trial court should have instructed the jury, as Roeth requested, that it must find the existence of the mitigating circumstance recognized in



§ 413(g)(6), namely, that "[t]he act of the defendant was not the sole proximate cause of the victim's death." Because Reid is a principal in the second degree to the murder of Mr. Bronstein, Rooth says his act is not the sole proximate cause of that death.

This argument was rejected in *Evans*, 304 Md. at 534, 499 A.2d at 1295 where we held that in the context of § 413(g)(6) "the General Assembly intended the words 'proximate cause' to apply only to direct physical causes of the victim's death, and not to acts of a principal in the second degree or an accessory before the fact which aided or abetted the act directly causing death." See also *Huffman v. State*, 304 Md. 559, 574-75, 500 A.2d 272, 279-80 (1985).

## XIV

The trial court furnished to the jury a verdict sheet in the form set forth in Maryland Rule 4-343(e). It listed the seven "statutory" mitigating factors enumerated in § 413(g)(1)-(7) and set forth the open-ended provision of § 413(g)(8) under which the jury could specifically set forth any other facts which it found to be mitigating circumstances and which we shall call "nonstatutory" mitigating circumstances. Rooth had asked the trial judge to use a verdict sheet prepared by the defense which listed, in addition to the seven statutory mitigating circumstances, six specific nonstatutory factors which Rooth considered had been raised by the evidence. The defense proffered verdict sheet also allowed for open-ended findings of other mitigating circumstances. The trial judge did not use the defense form of verdict sheet. Appellant now argues "that the trial judge, by limiting the verdict sheet, deprived Appellant of his constitutional right to have the sentencer make an informed decision on whether the death penalty should be imposed based on the use of *all* pertinent data before it." (Emphasis in original).

mitigating factors is that a trial court could be drawn into ruling that there is no basis for submitting a proposed factor and the court may thereby generate a meritorious issue as to whether the jury had indeed been improperly limited.

## XV, XVI and XVII

The three issues now under consideration all relate to the victim impact statement introduced as joint exhibit two at the sentencing hearing. Md.Code (1957, 1982 Repl.Vol., 1985 Cum.Supp.), Art. 41, § 124 requires in certain cases, including capital cases, the preparation and consideration of victim impact statements.

The statute was amended by Acts of 1983, Chs. 297 and 345, effective July 1, 1983. Because the subject murders were committed before July 1, 1983, Rooth contends that application of the amended victim impact statement statute to him is a prohibited *ex post facto* application. This argument was rejected in *Grandison v. State*, 305 Md. 685, 506 A.2d 580 (1986). And see *Dobbert v. Florida*, 432 U.S. 282, 293, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344, 356 (1977).

[29] Appellant also submits that Art. 41, § 124 is unconstitutional and that the introduction of victim impact evidence violates the Eighth and Fourteenth Amendments. The argument common to both of these submissions is that victim impact evidence injects an arbitrary factor into a capital sentencing proceeding. We considered and rejected this argument in *Lodowski v. State*, 302 Md. 631, 735-42, 490 A.2d 1228, 1251-54 (1985), vacated on other grounds, — U.S. —, 106 S.Ct. 1452, 89 L.Ed.2d 711 (1986). The analysis in *Lodowski* was "considered" *dicta*, intended for the guidance of trial courts and the bar. We apply that analysis in support of our holding here.

[30, 31] Rooth further argues that the *Lodowski* analysis rested the relevancy of victim impact information to capital sentencing exclusively on the legislative determination implicit in enacting the statute and that *Lodowski* failed to

[24] The argument has no merit because the verdict sheet actually used did not limit the jury. The trial judge made this plain in his instructions on nonstatutory mitigating factors. Judge Angeletti told the jury that it could consider under Item 8 in the section devoted to mitigating circumstances on the verdict sheet given to the jury

any fact or facts that the defendant claims or proposes as a mitigating circumstance or any fact or facts that any member of the jury proposes that could be a potential mitigating circumstance.... If all twelve members of the jury unanimously find that any or all of the proposed facts or mitigating circumstances, either proposed by the defendant or by the members of the jury, have been proven by a preponderance of the evidence, you list them under number eight and consider them....

Rooth did not have a right to require a written submission on the verdict sheet of the factors which he claimed existed and operated in mitigation. Indeed, the jury obviously understood that it was not limited to considering whether the statutory mitigating circumstances existed because the jury found nonstatutory mitigating circumstances, i.e., "A Family Environment," which was particularized as "1. Child Neglect" and "2. Lack of Strong Father Image."

[27, 28] We note that M.D.R. 4-343(e) provides that "[t]he findings and determinations shall be made in writing in the following form," but we need not decide in the instant case whether the rule prohibits listing proposed nonstatutory factors for the jury's consideration. In any capital murder case a jury is to consider whether the statutory mitigating factors exist, and if one is found to exist, it is a mitigating circumstance as a matter of law. With respect to nonstatutory factors the jury must find both that the circumstance exists and that it is mitigating. See *Foster*, 304 Md. at 492, 499 A.2d at 1258. In *Foster* the trial court had included proposed nonstatutory factors on the verdict sheet for the jury's consideration and had correctly instructed the jury on the difference between statutory and nonstatutory factors. A danger which we foresee in attempting to list possible

consider what Rooth calls the constitutional aspects. Certainly a primary purpose of the General Assembly in enacting a requirement for victim impact information was to insure that some consideration would be given to the victims of certain types of crimes when the perpetrator was sentenced, lest the emphasis on the perpetrator as an individual be so great as to exclude consideration of the victim. In capital cases the victims include survivors of the murdered individual.

[32, 33] There is no *per se* constitutional defect in using victim impact statement at a capital sentencing proceeding. The sentencing authority is not constitutionally restricted to considering only the operative facts in the commission of the crime, in addition to the circumstances of the perpetrator. This Court, speaking through Judge Cole in *Trimble v. State*, 300 Md. 387, 425, 478 A.2d 1143, 1155 (1984), explained the purposes behind the death penalty.

"The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.

"In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." [quoting *Gregg v. Georgia*, 429 U.S. 153, 183, 96 S.Ct. 2909, 2929-30, 49 L.Ed.2d 859, 880 (1976) (opinion announcing judgment) (footnotes omitted).]

[34] We have also reviewed the particular victim impact statement submitted in this case. Given the nature of the subject matter, it is a relatively straightforward and factual description of the effects of these murders on members of the Bronstein family. We are satisfied that the sentence of death was not imposed in this case under the influence of passion, prejudice or any other arbitrary factor § 414(e)(1). There was no error here in the admission of the victim impact statement.

## XVIII

Booth has preserved in his eighteenth issue an argument that the Maryland capital sentencing procedure is unconstitutional under the United States Constitution in two respects, mandatoriness and a defendant's burdens. These arguments were rejected as early as *Tichnell v. State* [Tichnell I], 287 Md. 695, 415 A.2d 839 (1980) and as recently as our opinion explaining the denial of motions for reconsideration in *Foster v. State*, *Evans v. State*, and *Huffington v. State*, 305 Md. 306, 503 A.2d 1726 (1986).

## XIX

[35] We find that the sentence of death in this case is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. § 41(c)(4). Booth killed 78-year-old Irvin Bronstein, while his hands were tied behind his back, by stabbing him in the chest twelve times, for the calculated purpose of preventing him from identifying Booth as a person who had entered the Bronsteins' home and robbed them. Booth murdered Mrs. Bronstein, though not as a principal in the first degree. Booth has been adjudged guilty of another first-degree murder committed approximately one month before the murders of the Bronsteins. That judgment of conviction, while still under review, is presumptively correct. Booth's criminal record also includes the following convictions: escape, 1983; assault, 1980; assault with intent to maim, 1978; assault, 1978; assault, 1975; assault with intent to maim, 1972; robbery, 1970.

Booth's co-perpetrator in the Bronstein murders, Reid, has been sentenced to death as the principal in the first degree of the murder of Mrs. Bronstein. That conviction has been affirmed. The death sentence imposed on Reid is under review but is presumptively correct. See *Reid v. State*, *supra*, 305 Md. 9, 501 A.2d 436.

[36-38] Our comparability review has also included consideration of *Lawrence Johnson v. State*, 303 Md. 487, 495

ELDRIDGE, Judge, concurring in part and dissenting in part.

The Supreme Court of the United States expressly held in *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), that comment by the prosecution on the defendant's refusal to testify is forbidden by the Fifth Amendment. Furthermore, in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Supreme Court held, under the circumstances, that such comment could not be deemed harmless error.

Departing from the Supreme Court's *Griffin* holding, the majority today decides that a defendant who declines to be a witness in the sentencing phase of his capital murder trial invites criticism for failing to take the stand merely because he exercises his state law right of allocution. The majority construes the defendant's speech in mitigation of his sen-

in which the party objects and the grounds of the objection." MD R. 4-325(c). This exception is inadequate to call to the trial judge's attention a claimed defect by way of the absence of an instruction on the ultimate burden of proof so that the issue was not preserved in the trial court for direct review. Further, the issue was waived on appeal by the omission from appellant's brief of any claim of error in constituting an express instruction covering an even balance result in the weighing process.

Now is the absence of an equivoque instruction "plain error in the instructions, material to the rights of the defendant, despite a failure to object," of which we might take cognizance under MD R. 4-325(c). The instruction as given tracked the statute. In *Foster v. State*, 304 Md. 419, 477-78, 499 A.2d 1216, 1256 (1985), we explained that the statute does not contain a clear inference regarding the allocation of the burden of proof or risk of nonpersuasion absent an additional provision specifying the result if the sentencing authority found that mitigating and aggravating circumstances were in a state of even balance or if the sentencing authority was unable to determine which balanced the other. Consequently, in *Tichnell v. State*, 287 Md. 695, 415 A.2d 839 (1980), this Court interpreted the statute to place the burden of persuasion upon the prosecution with regard to the weighing of aggravating and mitigating circumstances. Because the statute does not place the burden of persuasion with regard to the weighing process on the accused, the instructions in the instant case which tracked the statute did not place the burden on the accused.

By this analysis we do not indicate any opinion on the constitutionality of a statute imposing such a burden on a capital defendant

A.2d 1 (1985) and *Colvin v. State*, 299 Md. 98, 472 A.2d 953 (1984), in each of which we affirmed a death sentence imposed for the murder of an elderly person in that person's residence during the course of an entry and robbery. JUDGMENT AFFIRMED.

14. The foregoing opinion does not discuss the jury instructions with respect to the point advanced by Judge McAdiffe in his dissent because no such claim of error in the instructions was raised by Booth in brief or argument on appeal. Even if the point were properly before us, there was no trial court error in the instructions. What transpired is that one of Booth's proposed instructions dealt with the weighing of mitigating and aggravating circumstances. The last sentence of the three sentence proposed instruction read: "If a comparison of the totality of the aggravating factors with a totality of the mitigating factors leaves you in doubt as to the proper penalty you must impose life imprisonment." The instruction as given reads in relevant part:

Let's go to section three on page five [of the special verdict form]. Now section three says as follows: Based on the evidence, we unanimously find that it has been proven by a preponderance of the evidence that the mitigating circumstances marked yes in section two outweigh the aggravating circumstances marked yes in section one. There is a place for you to indicate yes or no and let me again stress the requirement of unanimity. That is, the finding under circumstance three must be the finding of all twelve jurors. With respect to section three, in balancing the various factors, you are not involved in a mere counting process. It is a weighing process and you may find that a single mitigating circumstance is sufficient in weight to justify a life sentence even if you find more than one aggravating circumstance. Conversely, you may conclude that a single aggravating circumstance, once weighed against the mitigating circumstances, is sufficient to justify a sentence of death. The number of aggravating and mitigating circumstances you find is not determinative in this balancing process. Rather you should decide what weight and quality each factor deserves and by your reasonable judgment in balancing the aggravating and mitigating circumstances, which you find to have been proven[,] you will determine whether the sentence will be life imprisonment or imposition of death. If you find that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death. If you find that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life. The sole defense exception to the instructions claimed a "failure to give our requested instructions in full, in the way they are written." The Court in a criminal case need not grant a requested instruction if the matter is fairly covered by instructions actually given. MD R. 4-325(c). Nor may a party assign as error "the failure to give an instruction unless the party objects . . . stating distinctly the matter

tence as a waiver of his Fifth Amendment right not to be a witness, and accordingly allow the prosecution to rebuke the defendant for not taking an oath and submitting to cross examination. I disagree.

In his closing argument to the jury in the sentencing phase of this capital murder trial, the prosecutor said:

"[PROSECUTING ATTORNEY]: There is but one reason John Booth did not take the witness stand and present his story as he told it to you in allocution. I'm not so naive a man to believe Mr. Booth would be so moved by the prospect of an oath that he would not break his oath. But, ladies and gentlemen, he stood here and testified, not under oath, for one reason only, to avoid cross-examination."

"[DEFENSE ATTORNEY]: Objection, your Honor."

"THE COURT: Overruled."

"[PROSECUTING ATTORNEY]: I assure you we had some questions for Mr. Booth. I ask you, don't be conned by this con man, don't be conned by this man who travels with fifteen names, don't be conned by a most accomplished liar."

These statements expressly criticized the defendant for declining to testify under oath and for avoiding cross examination. Such statements should not be included among the responses properly allowed by the majority opinion when a defendant exercises his right to allocute, namely, a rebuttal by record evidence and a reminder that what is said in allocution is not under oath, not subject to cross examination, and not evidence.

Comment on the refusal to testify penalizes the defendant for exercising a constitutional privilege. *Griffin v. California*, *supra*, 380 U.S. at 614, 85 S.Ct. at 1232. In fact, long before the Supreme Court's decision in *Griffin*, this Court flatly held that such comment violated a defendant's rights and was improper. *Smith v. State*, 169 Md. 474, 476, 182 A. 287 (1936). When a timely objection is made, as it was here, and an curative instruction is given, this kind of



comment ordinarily constitutes clear prejudice and requires reversal. *Hill v. State*, 10 Md.App. 362, 364, 270 A.2d 469 (1970). See also *McDonald v. State*, 61 Md.App. 461, 476, 487 A.2d 306 (1985).

When a defendant does not take the stand, but nevertheless injects unsupported or disputed factual statements into allocution, jury argument or questions to a witness, some courts have found a limited waiver of the defendant's privilege to avoid adverse comment on his silence. See, e.g., *Jones v. State*, 381 So.2d 983 (Miss.), cert. denied, 449 U.S. 1003, 101 S.Ct. 543, 66 L.Ed.2d 300 (1980); *Bontempo v. Fenton*, 692 F.2d 954 (3d Cir.1982), cert. denied, 460 U.S. 1055, 103 S.Ct. 1506, 75 L.Ed.2d 935 (1983); *United States ex rel. Miller v. Follette*, 278 F.Supp. 1003 (E.D.N.Y.), aff'd 397 F.2d 353 (2d Cir.1968), cert. denied, 393 U.S. 1039, 89 S.Ct. 600, 21 L.Ed.2d 585 (1969). The majority relies upon this line of cases. Such reliance, however, is misplaced.

The principal case relied on by the majority is the opinion of the Supreme Court of Mississippi in *Jones v. State*, supra. In *Jones*, the defendant declined to testify at the guilt or innocence phase of his trial for murder, but in his argument to the jury at the sentencing phase he made factual allegations unsupported by the record. The Mississippi Court ruled that "the prosecution may comment to the jury that the defendant's statements were not given under oath and that he was not subject to cross-examination about them." 381 So.2d at 993. In a subsequent case, *Williams v. State*, 445 So.2d 798 (Miss.1984), cert. denied, — U.S. —, 105 S.Ct. 803, 83 L.Ed.2d 795 (1985), after the defendant, at the sentencing phase of his murder trial, had made an unsworn statement not supported by the record, the prosecution "commented to the jury, in unfavorable terms, about the [defendant's] failure to give his version of the facts while under oath and subject to cross-examination." 445 So.2d at 814. The court cited its limited waiver holding in *Jones*, supra, and held that the prosecution's comment, along with other errors, required reversal for a new sentencing proceeding. The Mississippi Court thus distin-

guished comments explaining the nature of allocution from comments criticizing the defendant for not giving testimony.

The same distinction appears in *State v. Bontempo*, 170 N.J.Super. 220, 406 A.2d 203 (1979), and *Bontempo v. Fenton*, supra, 692 F.2d 954. Both the state and federal post conviction proceedings in *Bontempo* determined that the prosecution's comments constituted proper rebuttal to the defendant's statements and did not amount to comments on the defendant's failure to testify. 170 N.J.Super. at 244-245; 692 F.2d at 959.

Even when defendants represent themselves and try to evade the hazards of taking the stand by interjecting factual statements into their legal defense, courts will protect the defendants' Fifth Amendment rights and allow the prosecution to comment only "that the defendant's statements were not given under oath while he was subject to cross-examination and that they are, therefore, less weighty than sworn testimony." *United States ex rel. Miller v. Follette*, supra, 278 F.Supp. at 1007. The prosecution or court is allowed to comment on the quality of the statements made, but not to comment on the defendant's decision not to take the stand. *State v. Polk*, 5 Or.App. 605, 485 P.2d 1241 (1971); *State v. Johnson*, 121 Wis.2d 237, 358 N.W.2d 824 (1984). See *Redfield v. United States*, 315 F.2d 76 (9th Cir.1963); *Smith v. United States*, 234 F.2d 385 (5th Cir.1956); *State v. Schultz*, 46 N.J. 254, 216 A.2d 372, cert. denied, 304 U.S. 918, 86 S.Ct. 1367, 16 L.Ed.2d 439 (1966).

I agree with the majority that the prosecuting attorney in this case was entitled to tell the jury that evidence included testimony under oath or subject to cross-examination, but I cannot agree that the prosecution is permitted to tell the jury that the defendant did not take the witness stand in order to avoid cross-examination.

I concur in the judgment insofar as it upholds the guilty verdicts, but I would remand the case for a new capital sentencing proceeding.

COLE, Judge, concurring in part and dissenting in part.

The Court today affirms its dicta in *Lodowski v. State*, 302 Md. 691, 490 A.2d 1228 (1985) regarding victim impact statements and holds that there is no constitutional defect in the use of this evidence in capital sentencing proceedings. I vehemently disagree, and for the reasons stated in my opinion in *Lodowski*, I dissent.

Because of the importance of the constitutional issues involved, I shall restate in part what I said in *Lodowski* to show that the portion of Md.Code (1957, 1982 Repl. Vol., 1985 Cum.Supp.), Art. 41, § 124(d) authorizing the use of victim impact statements in capital sentencing proceedings is unconstitutional and that the admission of victim impact evidence in this case violated the eighth and fourteenth amendments of the United States Constitution.

I prefaced my opinion in *Lodowski* with several observations which I shall reiterate. First I do not object to the use of relevant victim impact evidence from the victim in non-capital sentencing proceedings. Such evidence can be valuable in sentencing proceedings, and when "coupled with active victim participation, acts to restore and increase confidence in the criminal justice system." 302 Md. at 754, 490 A.2d at 1250. My objection here is to the use of impact statements from the family of the victim in capital sentencing proceedings. I sympathize with the families of victims of heinous crimes and I realize that these persons suffer immense pain and untold emotional trauma. Nevertheless, "the court's paramount duty is to preserve the integrity and fundamental fairness of the criminal justice system guaranteed to every citizen under our federal and state constitutions." *Id.*

In *Lodowski*, I reviewed the Supreme Court decisions delineating the constitutional boundaries of capital sentencing procedures. I shall not repeat this analysis here, but I must stress that my discussion in *Lodowski* makes clear

that the eighth and fourteenth amendments require two basic safeguards in capital sentencing proceedings: (1) the death penalty must "not be imposed under sentencing procedures that created a substantial risk that it [will] be inflicted in an arbitrary and capricious manner," *Gregg v. Georgia*, 429 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 829, 893 (1976) (Stewart, J., joined by Powell and Stevens, JJ.); and (2) capital sentencing procedures must "guide [and focus] the jury's objective consideration of the particular circumstances of the individual offense and the individual offender." *Jurek v. Texas*, 428 U.S. 262, 273-74, 96 S.Ct. 2950, 2957, 49 L.Ed.2d 929, 939 (Stevens, J., joined by Stewart and Powell, JJ.) (emphasis supplied); see also *Proffitt v. Florida*, 428 U.S. 242, 259, 96 S.Ct. 2960, 2970, 49 L.Ed.2d 913, 927 (1976) (Powell, J., joined by Stewart and Stevens, JJ.). These principles form the constitutional foundation for modern death penalty statutes, and it is in light of these precepts that the use of victim impact evidence must be examined.

The use of victim impact statements in capital sentencing proceedings in Maryland is authorized by Art. 41, § 124(d), which provides:

- (d) In any case which the death penalty is requested under Article 27, § 412, a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted under Art. 27, § 413. [Emphasis supplied.]

Section 124(c)(3) describes the victim impact statement itself. It states:

- (3) A victim impact statement shall
  - (i) Identify the victim of the offense;
  - (ii) Itemize any economic loss suffered by the victim as a result of the offense;

- (iii) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;
- (iv) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;
- (v) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and
- (vi) Contain any other information related to the impact of the offense upon the victim or the victim's family that the court requires.

I believe that the language providing for the use of victim impact statements in capital sentencing proceedings cannot withstand constitutional scrutiny under the eighth and fourteenth amendment principles set forth *ante*. As I stated in *Lodowski*,

At a constitutional minimum, evidence introduced at a capital sentencing proceeding must be relevant as to whether the accused's life be taken or spared. The information must be relevant, of course, to avoid the arbitrary and capricious infliction of the death penalty. In light of this standard, several portions of § 124(c)(3) pass muster. For instance, the identity of the victim (e.g., police officer) is often relevant, see § 124(c)(3)(i), as is other information that goes to the character of the defendant and the circumstances of the offense, see § 124(c)(3)(v).

Other information called for by § 124(c), however, would rarely, if ever, be relevant in a capital sentencing proceeding. In particular, psychological services requested by the victim's family as a result of the offense are irrelevant. See § 124(c)(3)(v). In addition, it is difficult to see the relevance of whether the victim suffered any economic loss as a result of the offense, unless of course the victim was murdered during the course of a robbery or similarly economically-motivated crime. See

identification of any physical injury suffered by the victim as a result of the crime along with its seriousness and permanence, seems superfluous in a capital case for obvious reasons. Lastly, any changes in the victim's familial relationships as a result of the offense are irrelevant to the sentencing decision. See § 124(c)(3)(iv). (Otherwise, is a factor in imposing the death penalty would always be whether the victim died leaving a family. Few factors could be as irrelevant and arbitrary as those called for in §§ 124(c)(3)(ii), 124(c)(3)(iii), 124(c)(3)(iv), and 124(c)(3)(v).

302 Md. at 764, n. 6, 490 A.2d 1229, n. 6.

This type of evidence, then, interjects into the capital sentencing proceedings that same uncertainty and subjectivity decreed by the Supreme Court in *Gregg*. *Proffitt* and *Jurek*. What can be a more arbitrary factor in the decision to sentence a defendant to death than the words of the victim's family, which vary greatly from case to case, depending upon the ability of the family member to express his grief, or even worse depending upon whether the victim has family at all? In more practical terms, a killer of a person with an educated family would be put to death, whereas in a crime of similar circumstances, the killer of a person with an uneducated family or one without a family would be spared. This result cannot be countenanced if only upon the realization that lives cannot be compared to their respective worth.

As I see it, the ultimate crime is the taking of a life, and there can be no further measurement as to the value of the life taken. The proper focus in the capital sentencing procedure must be upon the circumstances "of the individual offense and the individual offender." *Jurek v. Texas*, *supra*, 428 U.S. at 273-74, 96 S.Ct. at 2953, 49 L.Ed.2d 31 at 939 (Stevens, J., joined by Stewart & Powell, JJ.), and not upon the particular victim's family.

In support of its holding that there is no *per se* constitutional error in the use of victim impact statements in capital proceedings, the Court quotes the following from *Trimble v. State*, 300 Md. 303, 425, 479 A.2d 1143, 1155 (1984):

"The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.

"In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self help to vindicate their wrongs." [Quoting *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2929-30, 49 L.Ed.2d 859, 860 (1976) (opinion announcing judgment) (footnotes omitted).]

In quoting this passage from *Trimble*, which is an exact quote from *Gregg v. Georgia*, the majority fails to note that *Gregg* also stands for the proposition that society's outrage at criminal acts and its need for retribution must be tempered by objectivity in the determination of whether a person is to be put to death. The *Gregg* plurality recognized that our moral outrage at offensive conduct may not be vented in an arbitrary and capricious manner. *Gregg v. Georgia*, *supra*, 428 U.S. at 188, 96 S.Ct. at 2932, 49 L.Ed. at 883 (Stewart, J., joined by Powell and Stevens, JJ.). Integral to the "legal process" on which our citizens must rely is the guarantee that the process will be fair and that our laws will be applied uniformly. Because victim impact evidence roles a capital sentencing proceeding of fairness and uniformity, its use cannot justifiably be sanctioned.

## II

Putting aside the constitutionality of the statute itself, it is clear in this case that the victim impact evidence is unconstitutional. I stated in *Lodowski* that

Time and again, the Supreme Court has emphasized that the sentence's discretion in a capital proceeding must be channeled and guided by clear, specific, and objective standards. See, e.g., *Barclay v. Florida*, *supra*, 463 U.S. [929] at 949, 103 S.Ct. [3419] at 3424, 77 L.Ed.2d [1134] at 1144, *Guilford v. Georgia*, *supra*, 446 U.S. [429]

at 428, 100 S.Ct. [1759] at 1764-65, 64 L.Ed. [399] at 406; *Woodson v. North Carolina*, *supra*, 429 U.S. [280] at 303, 96 S.Ct. [2978] at 2990-91, 49 L.Ed.2d [944] at 960. Evidence that has the effect of arousing the passion and prejudice of the sentencer does not satisfy this constitutional standard. Similarly, evidence irrelevant to the sentencing decision has no place in a capital sentencing proceeding.

302 Md. at 764-65, 490 A.2d at 1265-66. As in *Lodowski* a review of the victim impact statement in this case clearly demonstrates these points.

Agent Michelle Swann prepared a victim impact statement through interviews with the victims' son, daughter, son-in-law, and granddaughter. Agent Swann writes of the victims' son that he:

saw his parents alive for the last time on May 18th. They were having their lawn mowed and were excited about the onset of spring. He called them on the phone that evening and received no answer. He had made arrangements to pick Mr. Bronstein up on May 20th. They were both to be ushers in a granddaughter's wedding and were going to pick up their tuxedos. When he arrived at the house on May 20th he noticed that his parents' car wasn't there. A neighbor told him she hadn't seen the car in several days and he knew something was wrong. — went to this [sic] parents' house and found them murdered. He called his sister crying and told her to come right over because something terrible had happened and their parents were both dead.

The victims' son states that he can only think of his parents in the context of how he found them that day, and he can feel their fear and horror. It was 4:00 p.m. when he discovered their bodies and this stands out in his mind. He is always aware of when 4:00 p.m. comes each day, even when he is not near a clock. He also wakes up at 4:00 a.m. each morning. The victims' son states that he suffers from a lack of sleep. He is unable to drive on



the streets that pass near his parents' home. He also avoids driving past his father's favorite restaurant, the supermarket where his parents shopped, etc. He is constantly reminded of his parents. He sees his father coming out of synagogues, sees his parents' car, and feels very sad whenever he sees old people. The victims' son feels that his parents were not killed, but were butchered like animals. He doesn't think anyone should be able to do something like that and get away with it. He is very angry and wishes he could sleep and not feel so depressed all the time. He is fearful for the first time in his life, putting all the lights on and checking the locks frequently. His children are scared for him and concerned for his health. They phone him several times a day. At the same time he takes a fearful approach to the whereabouts of his children. He also calls his sister every day. He states that he is frightened by his own reaction of what he would do if someone hurt him or a family member. He doesn't know if he'll ever be the same again.

As with the testimony of Fletcher's widow in *Lodowski*, the testimony of the Bronsteins' son, however deserving of sympathy,

does not channel and guide the sentencer's discretion in a constitutionally permissible manner. By appealing to the passions and prejudices of the sentencing authority, the above quoted passage represents an "arbitrary factor" in the decisional process. In my view, it is arbitrary to base a decision as to whether an accused should live or die on the basis of subjective impressions a [family member] has of the crime.... Predicating the death penalty decision on this type of evidence propels us full force to the pre-Furman era of the arbitrary imposition of capital punishment.

302 Md. at 766, 490 A.2d at 1266.

The portion of the victim impact statement dealing with the impact of the victims' deaths upon their daughter and her husband further demonstrates this conclusion.

The victims' daughter and her husband didn't eat dinner for three days following the discovery of Mr. and Mrs. Bronstein's bodies. They cried together every day for four months and she still cries every day. She states that she doesn't sleep through a single night and thinks a part of her died too when her parents were killed. She reports that she doesn't find much joy in anything and her powers of concentration aren't good. She feels as if her brain is on overload. The victims' daughter relates that she had to clean out her parents' house and it took several weeks. She saw the bloody carpet, knowing that her parents had been there, and she felt like getting down on the rug and holding her mother. She wonders how this could have happened to her family because they're just ordinary people. The victims' daughter reports that she had become noticeably withdrawn and depressed at work and is now making an effort to be more outgoing. She notes that she is an emotionally tired because she doesn't sleep at night, that she has a tendency to fall asleep when she attends social events such as dinner parties or the symphony. The victims' daughter states that wherever she goes she sees and hears her parents. This happens every day. She cannot look at kitchen knives without being reminded of the murders and she is never away from it. She states that she can't watch movies with bodies or stabbings in it. She can't tolerate any reminder of violence. The victims' daughter relates that she used to be very trusting, but is not any longer. When the doorbell rings she tells her husband not to answer it. She is very suspicious of people and was never that way before.

The victims' daughter attended the defendant's trial and that of the co-defendant because she felt someone should be there to represent her parents. She had never been told the exact details of her parents' death and had to listen to the medical examiner's report. After a certain point, her mind blocked out and she stopped hearing. She states that her parents were stabbed repeatedly with

violence and she could never forgive anyone for killing them that way. She can't believe that anybody could do that to someone. The victims' daughter states that animals wouldn't do this. They didn't have to kill because there was no one to stop them from looking. Her father would have given them anything. The murders show the viciousness of the killer's anger. She doesn't feel that the people who did this could ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this. She feels that the lives of her family members will never be the same again. As I said in *Lodowski*, "the punishment of death, unique in its severity and irrevocability, see *Gregg v. Georgia*, supra, 428 U.S. at 187, 96 S.Ct. at 2931, 49 L.Ed.2d at 892, should not turn upon these considerations." 302 Md. at 767, 490 A.2d at 1267.

Agent Swann also reports the following concerning the victims' grandchildren:

Since the Jewish religion dictates that birth and marriage are more important than death, the granddaughter's wedding had to proceed on May 22nd. She had been looking forward to it eagerly, but it was a sad occasion with people crying. The reception, which normally would have lasted for hours, was very brief. The next day, instead of going on her honeymoon, she attended her grandparents' funerals. The victims' son, who was an usher at the wedding, cannot remember being there or coming and going from his parents' funeral the next day. The victims' granddaughter, on the other hand, vividly remembers every detail of the days following her grandparents' death. Perhaps she described the impact of the tragedy most eloquently when she stated that it was a completely devastating and life altering experience.

The victims' granddaughter states that unless you experience something like this you can't understand how it feels. You are in a state of shock for several months and then a terrible depression sets in. You are so angry and feel such

rage. She states that she only dwells on the image of their death when thinking of her grandparents. For a time she would become hysterical whenever she saw dead animals on the road. She is not able to drive near her grandparents' house and will never be able to go into their neighborhood again. The victims' granddaughter also has a tendency to turn on all the lights in her house. She goes into a panic if her husband is late coming home from work. She used to be an avid reader of murder mysteries, but will never be able to read them again. She has to turn off radio or T.V. when reports of violence come on because they hit too close to home. When she gets a newspaper she reads the comics and throws the rest away. She states that it is the small everyday things that haunt her constantly and always will. She saw a counselor for several months but stopped because she felt no one could help her.

The victims' granddaughter states that the whole thing has been very hard on her sister too. Her wedding anniversary will always be bittersweet and tainted by the memory of what happened to her grandparents. This year on her anniversary she and her husband quietly went out of town. The victims' granddaughter finds that she is unable to look at her sister's wedding picture. She also has a picture of her grandparents, but had to take it away because it was too painful to look at it.

Again although deserving of much sympathy, the effect of the victims' death upon their grandchildren is irrelevant to the sentencing process and serves only to arouse the passion and prejudice of the sentencer.

### III

In its closing argument, the State referred to the victim impact statement and argued as follows:

Ladies and gentlemen, if they prove the one mitigating circumstance or if they prove two or ten or a hundred or

two hundred or a thousand, nothing whatsoever about this man, about his background, about his feelings, about his emotions, about his moral capacity, could ever, in any way, outweigh the importance of what he did that day in May last year.... *If you get to section three and you have to balance it, take this presentence report and read out loud what is entitled the victim impact statement. For ladies and gentlemen that is the ultimate dimension of the crime he has committed....* [Emphasis supplied.]

As I noted in *Lodowski*, however, the procedure for the determination of whether the defendant must be put to death under § 413 does not include the victim impact statement as one of the aggravating circumstances to be weighed against the mitigating circumstances:

Of the ten aggravating circumstances listed in § 413(d), none specifically provides for consideration of victim impact evidence. Moreover, § 413(d) does not contain a "catch-all" similar to that set forth in the mitigating circumstances subsection (§ 413(g)) that would permit the sentencing authority to consider victim impact evidence. In the case *sub judice*, the sentence did not consider the victim impact evidence as a mitigating circumstance. For obvious reasons, victim impact evidence would rarely, if ever, be considered as a mitigating circumstance. Thus, the sentence necessarily must have considered that evidence as an aggravating circumstance without entering it into the formal statutory weighing process. Nowhere does § 413 permit the sentencing authority to weigh the mitigating and aggravating circumstances, then the victim impact evidence, at the time of sentencing. The imposition of the death penalty in this case therefore did not comport with the sentencing procedures contained in § 413.

392 Md. at 785-86, 430 A.2d at 1276.

Impact evidence from the victim's family has but one purpose: "to exacerbate the aggravating circumstances es-

tablished by the prosecution." *Id.* at 786, 430 A.2d at 1276. This type of evidence, however, has no place in a statutory weighing process which owes its very existence to the constitutional mandate that the death penalty must not be administered in an arbitrary or capricious manner.

In my view, victim impact evidence as was introduced in Roeth's death sentencing is constitutionally impermissible. While I concur in the judgment insofar as it upholds the guilty verdicts, I would vacate the sentence and remand for another sentencing proceeding which does not include such evidence.

McAuliffe, Judge, concurring in part and dissenting in part.

I concur in the affirmance of the conviction, but dissent from the decision to affirm the sentence of death.

For the reasons stated in the concurring and dissenting opinion in *Evans v. State*, 354 Md. 487, 539-40, 499 A.2d 1261 (1985), I believe the Maryland death penalty statute is in part unconstitutional. I agree with the contention made by Roeth in his eighteenth argument that our statute impermissibly places the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances in order to avoid the penalty of death.

Unfortunately, the erroneous allocation of the burden of persuasion that originated in the statute was perpetuated in the instructions given to this jury. Although the trial judge stated he was granting Roeth's proposed instruction number 9, which correctly assigned to the State the burden of establishing that the aggravating circumstances outweighed the mitigating circumstances in order to justify a sentence of death, he did not give that instruction.<sup>1</sup> Rather,

1. The majority opinion sets forth, in footnote 14, only the concluding sentence of Roeth's proposed instruction No. 9. I believe it is helpful to view the proposed instruction in its entirety:

Your next duty will be to weigh any mitigating circumstances which exist against any aggravating circumstances which exist.

he instructed the jury in the language of the statute and of the Findings and Sentencing Determination Form, and therefore effectively conveyed to the jury the erroneous message that in order to avoid a sentence of death the burden rested upon the defendant to prove by a preponderance of the evidence that the mitigating circumstances outweighed the aggravating circumstances.

I would vacate the sentence and remand for a new sentencing proceeding.

Because the State is attempting to establish that death is the appropriate punishment, the State bears the burden of establishing that the aggravating circumstances which you find outweigh the mitigating circumstances. Unless you find after considering the totality of the aggravating and mitigating circumstances, that the aggravating factors, documented by whatever mitigating circumstances exist, are sufficiently serious to require the sentence of death, you must impose life imprisonment. If a comparison of the totality of the aggravating factors with a totality of the mitigating factors leaves you in doubt as to the proper penalty you must impose life imprisonment.



STATE OF MARYLAND

V.

JOHN BOOTH  
A/K/A MARVIN BOOTH  
IND. NO. 18318813-17

IN THE

CIRCUIT COURT

FOR

BALTIMORE CITY

DEFENDANT'S PROPOSED INSTRUCTION NO. 17

Every citizen charged with a crime has the right to remain silent at trial, including the sentencing hearing. This is because it is the prosecutor's responsibility at a sentencing to prove the citizen guilty of an aggravating circumstance beyond a reasonable doubt. It is not the citizen's responsibility to prove himself innocent of any aggravating circumstances, nor is it the citizen's responsibility to prove that life imprisonment is the appropriate punishment.

... did not testify in this phase, as was his right. You shall not draw any inference of guilt from this choice. You shall not allow this choice to prejudice him in any way.

If you use his choice not to testify in any manner, you will have violated your oath that you have taken as jurors.

Points and Authorities:

Carter v. Kentucky, 450 U.S. 288 (1981)

Moss v. State, 632 S.W.2d 344 (Tex. 1992)

1 YOUR FAILURE TO GIVE OUR REQUESTED INSTRUCTIONS IN  
2 FULL, IN THE WAY THEY ARE WRITTEN.

3 THE COURT: VERY WELL. THE COURT WILL  
4 OVERRULE THOSE OBJECTIONS.

5 (WHEREUPON, COUNSEL RETURNED TO THE  
6 TRIAL TABLE AND PROCEEDINGS RESUMED IN OPEN  
7 COURT.)

8 THE COURT: MR. DOORY?

9 MR. DOORY: THANK YOU, YOUR HONOR.

10 MADAM FORELADY, LADIES AND GENTLEMEN OF  
11 THE JURY, ALTERNATES, I WILL BEGIN BY SAYING GOOD  
12 MORNING AND LET ME ALSO BEGIN BY THANKING YOU FOR  
13 THE PATIENCE YOU HAVE SHOWN US AND FOR THE  
14 ABSOLUTELY INCREDIBLE ATTENTIVENESS YOU HAVE SHOWN  
15 US.

16 I HAVE NEVER STOOD BEFORE A JURY WHERE I  
17 MORE HAD THE FEELING THAT IT WAS UNNECESSARY FOR  
18 ME TO ARGUE BECAUSE I FIRMLY BELIEVE THAT YOU  
19 UNDERSTAND WHAT HAS BEEN SAID IN THIS COURTROOM,  
20 YOU UNDERSTAND THE LAW AND YOU UNDERSTAND YOUR  
21 DUTY. I REALLY PROBABLY SHOULD SIT DOWN NOW, BUT  
22 AFTER WORKING IN THIS CASE FOR A YEAR AND A HALF,  
23 THERE ARE SOME THOUGHTS THAT I HAVE TO SHARE WITH  
24 YOU.

25 THE FIRST THOUGHT IS THIS. THIS IS THE

1 LAST TIME I WILL SPEAK TO YOU. THIS IS THE LAST  
 2 TIME THE STATE WILL SPEAK TO YOU. AS YOU RECALL  
 3 AT THE TRIAL ON THE ISSUE OF GUILT OR INNOCENCE,  
 4 THE STATE HAD A RIGHT TO COME BACK AND REBUT FOR  
 5 TWO REASONS, WE DIDN'T KNOW WHAT THE DEFENDANT WAS  
 6 GOING TO SAY AND THE BURDEN WAS ON THE STATE TO  
 7 CONVINC. YOU. THE BURDEN OF PERSUASION RESTED  
 8 WITH THE STATE. THE SYSTEM IS COMPLETELY OPPOSITE  
 9 NOW. IF YOU FIND AND I SUBMIT THAT YOU HAVE  
 10 ALREADY FOUND THAT THIS DEFENDANT KILLED IRVIN  
 11 BRONSTEIN AND THAT MURDER WAS COMMITTED DURING THE  
 12 COURSE OF A ROBBERY, THEN THE BURDEN SHIFTS  
 13 COMPLETELY TO THE DEFENSE TO DO TWO THINGS, TO  
 14 PRODUCE EVIDENCE TO PROVE TO YOU THAT THERE ARE  
 15 MITIGATING CIRCUMSTANCES WHICH EXIST AND THE  
 16 SECOND BURDEN, THAT THOSE MITIGATING CIRCUMSTANCES  
 17 OUTWEIGH THE CRIME HE HAS COMMITTED. I SUBMIT,  
 18 LADIES AND GENTLEMEN, THAT WHEN I TURN THE FLOOR  
 19 OVER TO MR. BROWN AND MS. SHEARER, THEY WILL PICK  
 20 UP THE IMPOSSIBLE BURDEN. FOR THE EVIDENCE IS  
 21 COMPLETE. IN FACT, THE EVIDENCE WAS COMPLETE  
 22 YESTERDAY. FOR NOTHING THAT I HAVE TO SAY NOW OR  
 23 HAD TO SAY WHEN I SAT IN THE CHAIR AT THE  
 24 MICROPHONE IS EVIDENCE, NOTHING MR. BROWN WILL  
 25 HAVE TO SAY TO YOU IS EVIDENCE, AND SURPRISINGLY

1 ENOUGH, NOTHING THAT JOHN BOOTH SAID TO YOU THIS  
 2 MORNING IS EVIDENCE.

3 MS. SHEARER: OBJECTION, YOUR HONOR.

4 THE COURT: OVERRULED.

5 MR. DOORY: REMEMBER WHAT THE JUDGE TOLD  
 6 YOU, I BELIEVE IN HIS VERY FIRST STATEMENT TO YOU,  
 7 EVIDENCE IS THREE THINGS. IT IS STIPULATIONS,  
 8 THAT WHICH COUNSEL AGREES TO BE FACT, IT IS  
 9 DOCUMENTS OR PICTURES OR ACTUAL OBJECTS PLACED  
 10 INTO EVIDENCE AND IT IS TESTIMONY UNDER OATH  
 11 SUBJECT TO CROSS-EXAMINATION FROM THE WITNESS  
 12 CHAIR. WHAT YOU HEARD THIS MORNING WAS JOHN BOOTH  
 13 IN HIS RIGHT OF ALLOCUTION. SOMETHING DIFFERENT  
 14 THAN TESTIMONY. FOR THE LAW PROVIDES THAT ANY MAN  
 15 BEFORE HE IS SENTENCED CAN SAY ANYTHING THAT IS ON  
 16 HIS MIND. BUT ANYTHING THAT IS ON HIS MIND IS NOT  
 17 AN ELEVATED LEVEL OF EVIDENCE.

18 MS. SHEARER: OBJECTION, YOUR HONOR.

19 THE COURT: OVERRULED.

20 MR. DOORY: THERE IS BUT ONE REASON JOHN  
 21 BOOTH DID NOT TAKE THE WITNESS STAND AND PRESENT  
 22 HIS STORY AS HE TOLD IT TO YOU IN ALLOCUTION. I'M  
 23 NOT SO NAIVE A MAN TO BELIEVE MR. BOOTH WOULD BE  
 24 SO MOVED BY THE PROSPECT OF AN OATH THAT HE WOULD  
 25 NOT BREAK HIS OATH. BUT, LADIES AND GENTLEMEN, HE

1 STOOD HERE AND TESTIFIED, NOT UNDER OATH, FOR ONE  
2 REASON ONLY, TO AVOID CROSS-EXAMINATION.

3 MS. SHEARER: OBJECTION, YOUR HONOR.

4 THE COURT: OVERRULED.

5 MR. DOORY: I ASSURE YOU WE HAD SOME  
6 QUESTIONS FOR MR. BOOTH. I ASK YOU, DON'T BE  
7 CONNED BY THIS CON MAN, DON'T BE CONNED BY THIS  
8 MAN WHO TRAVELS WITH FIFTEEN NAMES, DON'T BE  
9 CONNED BY A MOST ACCOMPLISHED LIAR.

10 BUT, EVEN THOUGH, WE HAD NO  
11 CROSS-EXAMINATION, EVEN THOUGH WE COULDN'T ASK THE  
12 MAN ONE QUESTION --

13 MS. SHEARER: OBJECTION.

14 THE COURT: OVERRULED.

15 MR. DOORY: -- THE LIES SHINED THROUGH  
16 HIS STATEMENT. HE JUST WASN'T, FOR ALL HIS  
17 TALENTS, A CON MAN. HE JUST WASN'T THAT GOOD A  
18 LIAR. DO YOU REALIZE WHAT HE HAS ACTUALLY SAID TO  
19 YOU? HE STARTS OUT BY EXPRESSING HIS SYMPATHY FOR  
20 THE BRONSTEIN FAMILY AS THEY SIT THERE. THAT IS A  
21 DEMEANING AND HORRIBLE INSULT BECAUSE NOT FIVE  
22 MINUTES LATER, WHEN HE DESCRIBED HIMSELF AS A  
23 PEDDLER AND HE TALKED ABOUT HIS METHOD OF GETTING  
24 PEOPLE TO PAY MORE THAN HIS JUNK JEWELRY IS WORTH,  
25 HE SAID LET THEM JEW HIM DOWN ON THE ONE HAND AND

1 THEN HE SAYS I HAVE SYMPATHY FOR YOU ON THE OTHER  
2 HAND. HIS DISHONESTY HAS SHOWN THROUGH AND HE  
3 DEMEANS THESE PEOPLE.

4 BUT EVEN GREATER THAN THAT, HE MADE A  
5 STATEMENT TO YOU THAT SHOULD SHINE A RED LIGHT AS  
6 PROOF THAT THAT MAN (INDICATING) IN THE FINAL  
7 ANALYSIS IS TRYING TO LIE TO YOU. THE STATEMENT  
8 WAS THIS, IT MUST HAVE BEEN A HORRIBLE CRIME FROM  
9 WHAT I READ IN THE NEWSPAPERS AND HEARD IN COURT  
10 AND SAW IN THE AUTOPSY. HE WAS RIGHT. IT WAS A  
11 HORRIBLE CRIME FROM WHAT WE READ IN THE NEWSPAPERS  
12 AND HEARD IN COURT AND SAW IN THE AUTOPSY. WHEN  
13 HE TRIED TO LIE TO YOU, HE FORGOT THE BEST OF HIS  
14 STORY JUST FOR A MOMENT. HE HAS FORGOTTEN THE  
15 STORY THAT HE'S BEEN WORKING ON FOR A YEAR AND A  
16 HALF BECAUSE HIS STORY WAS THERE AND IN PERSON.  
17 HE SAW THOSE BODIES LYING IN POOLS OF BLOOD. IT  
18 WAS NOT A HORRIBLE CRIME SIMPLY BECAUSE HE READ  
19 ABOUT IT. HE ADMITS TO YOU HE SAW THEM, BUT HE  
20 FORGETS TO STICK TO THAT STORY. LADIES AND  
21 GENTLEMEN, HE COULD HAVE SAID ANYTHING THAT HE  
22 WANTED WHEN HE STOOD HERE BEFORE YOU. ANYTHING.  
23 THE ONE THING HE DID NOT SAY IS THIS, I AM SORRY  
24 FOR WHAT I HAVE DONE. FOR I SUBMIT, HE IS NOT AND  
25 IN THE FINAL ANALYSIS, WITH HIS LIFE ON THE LINE,



1 NOT SUBJECT TO CROSS-EXAMINATION --

2 MS. SHEARER: OBJECTION, YOUR HONOR.

3 THE COURT: OVERRULED.

4 MR. DOORY: -- HE HAS ATTEMPTED ONCE  
5 AGAIN TO LIE HIS WAY OUT OF HIS PROBLEMS. PLEASE,  
6 PLEASE DO NOT BE SO NAIVE AS TO LET HIM DO THAT.

7 HE TELLS YOU IN HIS STATEMENT THAT THE  
8 STATE HAS HIS JEWELRY, THE JEWELRY THAT WE TALKED  
9 ABOUT DURING THIS CRIME, AND THAT IT'S SITTING  
10 DOWN AT POLICE HEADQUARTERS.-- DON'T FOR ONE MINUTE  
11 THINK THAT IF THAT EXISTED, THAT WOULDN'T BE HERE  
12 BEFORE YOU. EITHER THE STATE WOULD HAVE PRESENTED  
13 IT OR THE DEFENSE BY THEIR RIGHT COULD HAVE  
14 PRESENTED IT TO YOU HERE. PLEASE, PLEASE DON'T BE  
15 PERSUADED BY HIS LYING AND INNUENDOS.

16 THE TIME HAS COME, LADIES AND GENTLEMEN,  
17 FOR ME TO SPEAK TO YOU ABOUT YOUR DUTY AND I KNOW  
18 THAT WHAT WE'RE ASKING OF YOU IS NOT SOMETHING  
19 THAT IS EASY. WE KNOW THAT OF EACH ONE OF YOU.  
20 WE KNOW BECAUSE WE'VE TALKED TO EACH ONE OF YOU  
21 BEFORE YOU WERE SELECTED AS JURORS AND WE KNOW  
22 THAT EACH ONE OF YOU BRING WITH YOU THE NATURAL  
23 RELUCTANCE TO IMPOSE THIS SENTENCE. WE KNOW THAT  
24 ANY STRAIGHT-THINKING HUMAN BEING THAT WOULD HAVE  
25 TO SIT WHERE YOU ARE SITTING WOULD BRING THAT

1 NUMBERS DOWN PAT AFTER ALL THIS TIME.

2 THE CASE NOW IS JUST ABOUT READY FOR YOU  
3 TO MAKE YOUR DELIBERATIONS AND TO BE TURNED OVER  
4 TO YOU. THE FIRST PROCESS THAT WILL TAKE PLACE  
5 THIS MORNING IS WHAT IS CALLED THE ALLOCUTION.  
6 THAT MEANS THAT THE DEFENDANT HAS THE RIGHT TO  
7 ADDRESS YOU AND SAY WHATEVER IT IS HE WISHES TO  
8 SAY TO YOU CONCERNING THE MATTERS THAT YOU ARE  
9 GOING TO BE DELIBERATING ON. WHEN HE IS CONCLUDED  
10 WITH THAT PROCESS, I HAVE TO TAKE A SHORT BREAK  
11 BECAUSE YOU DO NOT HAVE YOUR FORMS. THERE IS AN  
12 ERROR ON THE FORM WHICH I PASSED OUT TO YOU  
13 YESTERDAY. THAT IS BEING CORRECTED AND IT WILL  
14 THEN BE PASSED OUT TO YOU AGAIN IN JUST A FEW  
15 MOMENTS. AT THAT POINT, YOU WILL HEAR THE  
16 INSTRUCTIONS OF THE COURT AND THEN YOU WILL HEAR  
17 THE ARGUMENTS OF COUNSEL AND THEN YOU WILL RETIRE  
18 TO DELIBERATE.

MR. BOOTH?

19 THE DEFENDANT: YES, SIR.

20 FIRST OF ALL, GOOD MORNING EVERYBODY.

21 THE JURY: GOOD MORNING.

22 THE DEFENDANT: AS EVERYBODY KNOWS I'M  
23 THE DEFENDANT IN THIS CASE. I FINALLY GET A  
24 CHANCE TO SAY SOMETHING TO YOU. I WOULD LIKE TO  
25 THANK ALL OF Y'ALL FOR THE TIME AND THE



1 CONSIDERATION THAT YOU GAVE ME DURING THE  
 2 GUILT-INNOCENCE PHASE OF THE TRIAL. I HOLD NO  
 3 RESENTMENT OR ANYTHING LIKE THAT AGAINST ANYBODY  
 4 BECAUSE OF THE VERDICT THAT YOU CAME BACK WITH.  
 5 PERHAPS, IF I WERE A MEMBER OF THE JURY, I WOULD  
 6 HAVE CAME BACK WITH THE SAME VERDICT. BUT THE  
 7 CASE ITSELF, THIS CASE, THESE CHARGES THAT I HAVE  
 8 BEEN CHARGED WITH, THE ONLY THING THAT I'M GUILTY  
 9 OF IN THIS CASE IS THEFT. THAT'S THE ONLY THING I  
 10 DID. I DIDN'T KILL ANYBODY. I DIDN'T PLAN THE  
 11 MURDER OR ROB THEM OR I DIDN'T KILL THOSE POOR  
 12 PEOPLE. I TOOK NO PART IN IT WHATSOEVER, IN THE  
 13 MURDER. I DID STEAL SOMETHING OUT OF THAT HOUSE  
 14 AND THAT'S THE ONLY THING THAT I DID.

15 NOW THE STATE, THEY KNEW THIS, YOU KNOW.  
 16 I'M SAYING THEY HAD A PERFECT CASE FOR A BURGLARY,  
 17 BUT THEY DIDN'T PUT THAT EVIDENCE BEFORE YOU.  
 18 LADIES AND GENTLEMEN, THEY DIDN'T PUT EVIDENCE OF  
 19 A BURGLARY BEFORE Y'ALL. THEY DIDN'T CHARGE ME  
 20 WITH BURGLARY. THEY TOOK THAT EVIDENCE AND PUT IT  
 21 BEFORE YOU AND LET YOU DELIBERATE ON THE MURDER  
 22 AND ARMED ROBBERY. WHEN IN FACT THE ONLY EVIDENCE  
 23 THAT THEY HAD AGAINST ME IN THIS CASE WAS THE  
 24 EVIDENCE OF A THEFT. YOU HAD TO FIND ME GUILTY OF  
 25 SOMETHING BECAUSE EVEN BY MY OWN ADMISSION EARLIER --

1 I MEAN, YOU WOULDN'T KNOW, BUT BY MY OWN ADMISSION,  
 2 I ADMITTED THAT I STOLE SOMETHING OUT OF THAT  
 3 HOUSE. THAT DIDN'T SATISFY THE PEOPLE. THAT'S  
 4 THE REASON WHY I'M FACING THE MURDER CHARGES  
 5 BECAUSE I DON'T KNOW WHO KILLED THE PEOPLE.  
 6 PERHAPS, IF I KNEW WHO THE UNIDENTIFIED  
 7 FINGERPRINTS BELONGED TO IN THAT HOUSE, I COULD  
 8 GIVE THEM A NAME OR AN ADDRESS OR A DESCRIPTION,  
 9 BUT I DON'T KNOW WHO THOSE FINGERPRINTS BELONGED  
 10 TO. IT DOESN'T BELONG TO ANYBODY WHOSE BEEN  
 11 ASSOCIATED WITH THIS CASE. NO POLICE INVESTIGATED  
 12 THE CRIME SCENE. NOBODY HAD ACTUALLY BEEN CHARGED  
 13 IN THE CASE, BUT THE FINGERPRINTS ARE THERE. THEY  
 14 DON'T BELONG TO THE VICTIM OR ANYONE IN THE  
 15 VICTIM'S FAMILY. I SYMPATHIZE WITH THE BRONSTEIN  
 16 FAMILY. IT'S A TERRIBLE THING. IT WAS A HORRIBLE  
 17 CRIME THAT OCCURRED UP THERE. BUT I DID NOT KILL  
 18 THE PEOPLE. I HAD NO PART IN KILLING THE PEOPLE.  
 19 IT'S JUST THAT THIS THING HAS BEEN LIKE A  
 20 NIGHTMARE. FROM DAY ONE, I'VE BEEN THE SUSPECT  
 21 AND THE PRIME SUSPECT IN THIS MURDER BECAUSE I HAD  
 22 A PRIOR CRIMINAL RECORD. I TRIED TO CUT A FEW  
 23 AVENUES AT THE BEGINNING OF THE CHARGES BY SAYING  
 24 I WAS HERE OR THERE BECAUSE I WAS SCARED TO DEATH  
 25 AND I'M SCARED TO BEING PUT DOWN FOR COMMITTING A

1 THEFT. THE ONLY THING I DID WAS BURGLARIZE THE  
 2 HOUSE. BUT LIKE I SAID MR. DOORY AND MR. CROWE,  
 3 THEY DIDN'T CHARGE ME WITH BURGLARY BECAUSE THEY  
 4 KNEW WHAT THE JURY WAS GOING TO BE DELIBERATING ON,  
 5 WHAT DID THE MAN ACTUALLY DO? I STOLE SOMETHING.  
 6 NO EVIDENCE WAS EVER PRODUCED IN THE TRIAL TO SAY  
 7 THAT I KILLED SOMEBODY. NOBODY EVER SAW ME KILL  
 8 NOBODY. NOBODY SAID THAT I KILLED ANYBODY. BUT  
 9 MR. DOORY, HIMSELF, THE STATE'S ATTORNEY'S OFFICE,  
 10 FABRICATED THE STATEMENTS OF WITNESSES. THEY  
 11 REARRANGED STATEMENTS. THEY CHANGED WORDS IN  
 12 STATEMENTS. THEY BUILT THIS CASE. SO IT REALLY  
 13 WASN'T SO MUCH THE TESTIMONY OF INDEPENDENT  
 14 WITNESSES YOU WERE HEARING. MR. CROWE AND MR.  
 15 DOORY SAID WHAT THEY WANTED THE WITNESSES TO  
 16 TESTIFY TO. THEY PUT WORDS IN THE WITNESSES'  
 17 MOUTHS. I MEAN ALL DURING THE TRIAL, THEY DID  
 18 THIS.

19 NOW THIS CASE, IT HAS HAD A TERRIBLE  
 20 EFFECT ON ME AND MY FAMILY AND PARTICULARLY, MY  
 21 WIFE. MY WIFE HAS ATTEMPTED SUICIDE. MY  
 22 GRANDFATHER HAD A STROKE. HE'S PAST AWAY. HE'S  
 23 DECEASED NOW AS A RESULT OF ME FACING A DEATH  
 24 PENALTY IN THIS CASE. NOW I'M NOT AN ANGEL, BUT  
 25 I'M NOT LYING. YES, I DO WRONG THINGS. I STEAL.

1 I HAVE LIED BEFORE AND STUFF LIKE THAT, BUT I HAVE  
 2 NEVER KILLED ANYBODY AND I NEVER PARTICIPATED IN  
 3 THE MURDER.

4 THE FEW INSTANCES THAT I HAVE BEEN  
 5 INVOLVED IN CRIME HAS ALWAYS BEEN ON A SMALL  
 6 SCALE. I'VE BEEN INVOLVED IN SMALL CRIMES,  
 7 ASSAULT AND ROBBERY OR SOMETHING LIKE THAT. I GOT  
 8 A MAIM CONVICTION THAT RESULTED FROM AN EMPLOYER  
 9 WHO WAS WITHHOLDING PAYMENT FROM ME. HE KEPT MY  
 10 MONEY. I GOT INTO A HEATED ARGUMENT WITH THIS MAN  
 11 AND A FIGHT ENSUED AND THE MAN GOT MAD, BUT THE  
 12 STATE IS NOT GOING TO TELL YOU ALL OF THIS. THEY  
 13 ARE JUST GOING TO PUSH THIS STUFF IN FRONT TO MAKE  
 14 YOU THINK I'M SOME SORT OF AN ANIMAL. I'M NOT  
 15 LIKE THAT. I ADMIT THAT I WENT INTO THOSE  
 16 PEOPLE'S HOME AND I STOLE MERCHANDISE, BUT I  
 17 DIDN'T KILL THE PEOPLE. IT WAS WRONG AND ALL OF  
 18 THAT FOR ME TO STEAL. I KNOW THAT. BUT I'M  
 19 SAYING TO SENTENCE ME TO DEATH FOR MERELY STEALING  
 20 SOMETHING IS NOT RIGHT. THAT'S NOT JUSTICE. IT  
 21 IS NOT JUSTICE. THE EFFECT OF THIS THING ON MY  
 22 GRANDMOTHER HAS BEEN HARD. SHE IS UNDER DOCTOR'S  
 23 CARE. SHE HAS HEART PROBLEMS AND I THINK THAT IF  
 24 I AM SENTENCED TO DEATH, THAT WOMAN WOULD ACTUALLY  
 25 DIE. I KNOW IT. IT WOULD REALLY, REALLY HURT ME.

1 I MEAN I WOULDN'T KNOW WHAT TO DO. I KNOW I  
 2 BROUGHT THIS ON MYSELF BY GOING INTO THAT HOUSE.  
 3 BUT TO KNOW THAT I MAY CAUSE SOMEBODY ELSE'S DEATH,  
 4 YOU UNDERSTAND, WOULD BE TOO MUCH FOR ME TO BEAR.  
 5 LIKE I SAID, MY WIFE, SHE HAS ATTEMPTED SUICIDE  
 6 BECAUSE OF THE WAY THAT MR. DOORY REARRANGED HER  
 7 STATEMENT. MY GRANDFATHER HAS PASSED AWAY BECAUSE  
 8 I'M FACING THE DEATH PENALTY IN THIS CASE.

9 I DON'T KNOW WHAT ELSE I CAN TELL YOU  
 10 ABOUT MY SITUATION. I'VE NEVER BEEN A REAL GOOD  
 11 SPEAKER IN FRONT OF PEOPLE OR ANYTHING LIKE THAT.  
 12 I'M NOT GIFTED WITH WORDS OR NOTHING LIKE THAT.  
 13 SO I JUST GOT TO TELL Y'ALL HOW I FEEL NOW, HOW I  
 14 SEE THINGS. I'M JUST TRYING TO BE AS HONEST AND  
 15 OPEN AS I CAN WITH YOU AND HOPE AND PRAY TO GOD  
 16 THAT SOMEBODY ON THIS JURY WILL HAVE ENOUGH  
 17 INTELLIGENCE TO KNOW THAT NOBODY BUT AN ANIMAL  
 18 COULD KILL PEOPLE LIKE THAT FOR A COUPLE OF  
 19 DAMAGED TV'S AND SOME SILVERWARE. I MEAN IT'S  
 20 RIDICULOUS. NOBODY IN THEIR RIGHT MIND COULD DO  
 21 SOMETHING LIKE THAT. I'M NOT INSANE. I'M NOT  
 22 GIDDY. THERE'S NOTHING WRONG WITH ME EXCEPT THAT  
 23 I HAVE NORMAL ANTISOCIAL BEHAVIOR PATTERNS. I  
 24 DON'T DENY THAT BECAUSE LIKE I SAID I DO STEAL.  
 25 I'M A THIEF. I MEAN IF I COULD CHARACTERIZE MY

1 JOB, I WOULD HAVE TO CLASSIFY MY JOB AS BEING A  
 2 THIEF. A MURDERER, A ROBBER AND ALL THAT KIND OF  
 3 STUFF, I'M NOT THAT.

4 NOW I KNOW THE STATE IS TRYING TO PUMP  
 5 ME UP, BUILD ME UP. THEY'VE PLAYED ON EVERYBODY'S  
 6 EMOTIONS IN THIS CASE, YOU KNOW, BY CONTINUOUSLY  
 7 ALLUDING TO THE BRUTAL WAY THAT THOSE PEOPLE WERE  
 8 KILLED. BUT THE PEOPLE WERE KILLED IN A BRUTAL  
 9 MANNER AND FROM WHAT I HEARD IN COURT, FROM THE  
 10 AUTOPSY REPORT, FROM THE NEWSPAPER ACCOUNTS, IT  
 11 WAS TERRIBLE. BUT IT'S NOT MY FAULT. I DIDN'T  
 12 KILL THEM. I HAD NOTHING TO DO WITH THOSE PEOPLE  
 13 DYING. I TOOK NO PART IN THE PLANNING IN WHATEVER  
 14 HAPPENED TO THOSE PEOPLE, THEM BEING ROBBED OR  
 15 NOTHING LIKE THAT. I DIDN'T HAVE NOTHING AT ALL  
 16 TO DO WITH IT. THE ONLY THING I DID WAS STOLE  
 17 SOMETHING.

18 NOW ALL DURING THE TRIAL, YOU HEARD THE  
 19 STATE ALLUDE TO -- ASK DIFFERENT WITNESSES WHAT  
 20 ABOUT THIS BAG OF JEWELRY, WHAT ABOUT THIS BAG OF  
 21 JEWELRY. THEY DIDN'T EVEN SHOW THE JEWELRY TO  
 22 YOU. THE JEWELRY IS AT THE BALTIMORE CITY POLICE  
 23 DEPARTMENT. IT HASN'T BEEN IDENTIFIED BY THE  
 24 BRONSTEINS AS THE JEWELRY BELONGING TO THEM. IT  
 25 WAS SOME JEWELRY THAT I SOLD ON THE STREET TO



1 PEOPLE. WITH A LITTLE LARCENY IN MY HEART, I  
2 WOULD CHANGE THE PRICE TAG ON IT. I WOULD TELL  
3 SOMEBODY I JUST STOLE IT OUT OF S. AND M. KATE AND  
4 PUT A HUNDRED DOLLAR PRICE TAG ON IT AND LET THEM  
5 JEW ME DOWN FROM A HUNDRED DOLLARS TO SEVENTY OR  
6 EIGHTY, WHEN I ONLY PAID EIGHT DOLLARS FOR IT.  
7 THE JEWELRY ITSELF IS IN THE POSSESSION OF THE  
8 POLICE DEPARTMENT. THE STATE DIDN'T SHOW YOU THAT.

9 WHEN I WENT INTO THAT HOUSE, I DIDN'T  
10 TAKE ANYTHING OUT THERE BUT TV'S AND LITTLE JUNK  
11 STUFF, ALL THIS JEWELRY, AND MONEY AND STUFF. I  
12 NEVER SEEN WHAT ELSE WAS THERE. WHO EVER KILLED  
13 THOSE PEOPLE, THEY GOT THAT. WHEN I DISCOVERED  
14 THOSE BODIES IN THAT HOUSE, I DECIDED WELL, I'M  
15 GOING TO BURGLARIZE THE HOUSE. FOUR OF US SAT  
16 DOWN, AND THAT'S THE ONLY CONSPIRACY THAT OCCURRED  
17 IN THIS CASE. WE SAT DOWN AND SAID WE ARE GOING TO  
18 THE HOUSE AND TRY TO BURGLARIZE IT OR SOMETHING.  
19 THAT'S WHAT WE DID. BUT AS FAR AS CONSPIRING TO  
20 ROB OR KILL AND ALL THAT, THAT NEVER TOOK PLACE.  
21 NONE OF THAT STUFF NEVER TOOK PLACE. THE ONLY  
22 THING I DID WAS STOLE SOMETHING.

23 I THANK YOU FOR THE TIME THAT YOU  
24 AFFORDED ME IN LISTENING TO ME AND EVERYTHING AND  
25 I HOPE AND I PRAY TO GOD THAT YOU COME BACK WITH

1 SOME KIND OF FAVORABLE DECISION. I'M SCARED TO  
2 DEATH OF BEING PUT TO DEATH FOR SIMPLE THEFT OR  
3 BURGLARY AT MOST. THAT'S THE ONLY THING I DID. I  
4 DIDN'T KILL ANYBODY. I SWEAR TO GOD. I DIDN'T  
5 KILL NOBODY. I KNOW NOTHING ABOUT NO ROBBERY OR  
6 NOTHING ELSE. THE ONLY THING I DID WAS STOLE  
7 SOMETHING.

8 THE COURT: THANK YOU, MR. BOOTH.

9 LADIES AND GENTLEMEN, AS I INDICATED, WE  
10 ARE GOING TO TAKE A SHORT RECESS AT THIS POINT  
11 WHILE THE COURT PREPARES THE FINAL INSTRUCTIONS  
12 FOR YOU AND COUNSEL PREPARES THEIR ARGUMENTS. YOU  
13 WILL BE BROUGHT BACK DOWN IN TEN MINUTES. WE ARE  
14 GOING TO BRING YOU DOWN PROMPTLY AT 10:30.  
15 HOPEFULLY, WE WILL HAVE THE SHEETS PREPARED FOR  
16 YOU AT THAT TIME. YOU MAY BE EXCUSED NOW.

17 (WHEREUPON, THE JURY WAS EXCUSED FROM  
18 THE COURTROOM, AFTER WHICH THE FOLLOWING  
19 PROCEEDINGS WERE HAD:)

20 THE COURT: COUNSEL, WE WILL RECONVENE  
21 PROMPTLY AT 10:30.

22 (WHEREUPON, THE COURT RECESSED,  
23 FOLLOWING WHICH THE PROCEEDINGS IN THIS MATTER  
24 RESUMED.)

25 THE COURT: I HAVE REDONE THE FINDING



Of counsel:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of September, 1986,  
the Brief in Opposition to the Petition for Writ of Certiorari  
was mailed to the court and copies thereof were mailed,  
postage prepaid, to George E. Burns, Jr., Julia Doyle  
Bernhardt, and Laurie I. Mikva, Assistant Public Defenders,  
312 N. Eutaw Street, Baltimore, Maryland 21201.

*Valerie V. Cloutier*  
VALERIE V. CLOUTIER,  
Assistant Attorney General

DPP-INV-8 (REVISED 4/83)



STATE OF MARYLAND  
DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES  
DIVISION OF PAROLE AND PROBATION

DEFENDANT'S  
EXHIBIT  
*Law*

VICTIM IMPACT STATEMENT

CASE NAME: Booth, John E.  
COURT CASE NO.: 18318813, 14, 15, 16, 17

Victim's Name: Bronstein, Irvin & Rose (deceased)  
(See attached statement)

I. Economic Loss

A. Damages Suffered

1. Value of property lost or destroyed .....	\$ _____
2. Hospital, medical expense(s) .....	\$ _____
3. Lost income or wages .....	\$ _____
4. Miscellaneous expense(s) (List type and amount) a) _____	\$ _____
b) _____	\$ _____
Total Loss .....	\$ _____

B. Reimbursement Received

1. Property insurance .....	\$ _____
2. Hospital/medical insurance .....	\$ _____
3. Sick leave pay .....	\$ _____
4. Other (List source and amount) a) _____	\$ _____
b) _____	\$ _____
Total Reimbursement .....	\$ _____

C. Economic Loss Not Reimbursed (A minus B) .... \$ \_\_\_\_\_

\*Indicates information not supported by bill, cancelled check,  
receipt, or written estimate.

II. Physical Injury (type, seriousness, and permanence)

Irvin and Rose Bronstein died as a result of multiple stab wounds

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

III. Psychological Impact

A. Psychiatric or psychological counseling required by victim.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

B. Effect upon victim's personal welfare or familial relationships.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

IV. Additional Information

\_\_\_\_\_  
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\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Field Supervisor      Date

Parole & Probation Agent      Date

VICTIM IMPACT STATEMENT

CASE NAME: Booth, John E.

The following Victim Impact Statement was prepared by Agent Michelle Swann on 6/21/84, in the case against co-defendant Willie Reid. Subsequent contact with the victim's son, Barry Bronstein, via Assistant State's Attorney Tim Doory on 9/25/84, indicates that the following statement is valid and current, and that the family has nothing else to add.

"Mr. and Mrs. Bronstein's son, daughter, son-in-law, and granddaughter were interviewed for purposes of the Victim Impact Statement. There are also four other grandchildren in the family. The victims' son reports that his parents had been married for fifty-three years and enjoyed a very close relationship, spending each day together. He states that his father had worked hard all his life and had been retired for eight years. He describes his mother as a woman who was young at heart and never seemed like an old lady. She taught herself to play bridge when she was in her seventies. The victims' son relates that his parents were amazing people who attended the senior citizens' center and made many devout friends. He indicates that he was very close to his parents and talked to them every day. The victims' daughter also spent lots of time with them.

The victims' son saw his parents alive for the last time on May 18th. They were having their lawn manicured and were excited about the onset of spring. He called them on the phone that evening and received no answer. He had made arrangements to pick Mr. Bronstein up on May 20th. They were both to be ushers in a granddaughter's wedding and were going to pick up their tuxedos. When he arrived at the house on May 20th he noticed that his parents' car wasn't there. A neighbor told him she hadn't seen the car in several days and he knew something was wrong. He went to this parents' house and found them murdered. He called his sister crying and told her to come right over because something terrible had happened and their parents were both dead.

The victims' daughter recalls that when she arrived at her parents' house, there were police officers and television crews everywhere. She felt numb and cold. She was not allowed to go into the house and so she went to a neighbor's home. There were people and reporters everywhere and all she could feel was cold. She called her older daughter and told her what had happened. She told her daughter to get her husband and then tell her younger daughter what had happened. The younger daughter was to be married two days later.

The victims' granddaughter reports that just before she received the call from her mother she had telephoned her grandparents and received no answer. After her mother told her what happened she turned on the television and heard the news reports about it. The victims' son reports that his children first learned of their grandparents' death from the television reports.

CASE NAME: Booth, John E.

Victim Impact Statement

Since the Jewish religion dictates that birth and marriage are more important than death, the granddaughter's wedding had to proceed on May 22nd. She had been looking forward to it eagerly, but it was a sad occasion with people crying. The reception, which normally would have lasted for hours, was very brief. The next day, instead of going on her honeymoon, she attended her grandparents' funerals. The victims' son, who was an usher at the wedding, cannot remember being there or coming and going from his parents' funeral the next day. The victims' granddaughter, on the other hand, vividly remembers every detail of the days following her grandparents' death. Perhaps she described the impact of the tragedy most eloquently when she stated that it was a completely devastating and life altering experience.

The victims' son states that he can only think of his parents in the context of how he found them that day, and he can feel their fear and horror. It was 4:00 p.m. when he discovered their bodies and this stands out in his mind. He is always aware of when 4:00 p.m. comes each day, even when he is not near a clock. He also wakes up at 4:00 a.m. each morning. The victims' son states that he suffers from a lack of sleep. He is unable to drive on the streets that pass near his parents' home. He also avoids driving past his father's favorite restaurant, the supermarket where his parents shopped, etc. He is constantly reminded of his parents. He sees his father coming out of synagogues, sees his parents' car, and feels very sad whenever he sees old people. The victims' son feels that his parents were not killed, but were butchered like animals. He doesn't think anyone should be able to do something like that and get away with it. He is very angry and wishes he could sleep and not feel so depressed all the time. He is fearful for the first time in his life, putting all the lights on and checking the locks frequently. His children are scared for him and concerned for his health. They phone him several times a day. At the same time he takes a fearful approach to the whereabouts of his children. He also calls his sister every day. He states that he is frightened by his own reaction of what he would do if someone hurt him or a family member. He doesn't know if he'll ever be the same again.

The victims' daughter and her husband didn't eat dinner for three days following the discovery of Mr. and Mrs. Bronstein's bodies. They cried together every day for four months and she still cries every day. She states that she doesn't sleep through a single night and thinks a part of her died too when her parents were killed. She reports that she doesn't find much joy in anything and her powers of concentration aren't good. She feels as if her brain is on overload. The victims' daughter relates that she had to clean out her parents' house and it took several weeks. She saw the bloody carpet, knowing that her parents had been there, and she felt like getting down on the rug and holding her mother. She wonders how this could have happened to her family because they're just ordinary people. The victims' daughter reports that she had become noticeably withdrawn and depressed at work and is now making an effort to be

CASE NAME: Booth, John E.

Victim Impact Statement

more outgoing. She notes that she is so emotionally tired because she doesn't sleep at night, that she has a tendency to fall asleep when she attends social events such as dinner parties or the symphony. The victims' daughter states that wherever she goes she sees and hears her parents. This happens every day. She cannot look at kitchen knives without being reminded of the murders and she is never away from it. She states that she can't watch movies with bodies or stabbings in it. She can't tolerate any reminder of violence. The victims' daughter relates that she used to be very trusting, but is not any longer. When the doorbell rings she tells her husband not to answer it. She is very suspicious of people and was never that way before.

The victims' daughter attended the defendant's trial and that of the co-defendant because she felt someone should be there to represent her parents. She had never been told the exact details of her parents' death and had to listen to the medical examiner's report. After a certain point, her mind blocked out and she stopped hearing. She states that her parents were stabbed repeatedly with viciousness and she could never forgive anyone for killing them that way. She can't believe that anybody could do that to someone. The victims' daughter states that animals wouldn't do this. They didn't have to kill because there was no one to stop them from looting. Her father would have given them anything. The murders show the viciousness of the killers' anger. She doesn't feel that the people who did this could ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this. She feels that the lives of her family members will never be the same again.

The victims' granddaughter states that unless you experience something like this you can't understand how it feels. You are in a state of shock for several months and then a terrible depression sets in. You are so angry and feel such rage. She states that she only dwells on the image of their death when thinking of her grandparents. For a time she would become hysterical whenever she saw dead animals on the road. She is not able to drive near her grandparents' house and will never be able to go into their neighborhood again. The victims' granddaughter also has a tendency to turn on all the lights in her house. She goes into a panic if her husband is late coming home from work. She used to be an avid reader of murder mysteries, but will never be able to read them again. She has to turn off the radio or T.V. when reports of violence come on because they hit too close to home. When she gets a newspaper she reads the comics and throws the rest away. She states that it is the small everyday things that haunt her constantly and always will. She saw a counselor for several months but stopped because she felt no one could help her.



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Victim Impact Statement

The victims' granddaughter states that the whole thing has been very hard on her sister too. Her wedding anniversary will always be bittersweet and tainted by the memory of what happened to her grandparents. This year on her anniversary she and her husband quietly went out of town. The victims' granddaughter finds that she is unable to look at her sister's wedding pictures. She also has a picture of her grandparents, but had to put it away because it was too painful to look at it.

The victims' family members note that the trials of the suspects charged with these offenses have been delayed for over a year and the postponements have been very hard on the family emotionally. The victims' son notes that he keeps seeing news reports about his parents' murder which show their house and the police removing their bodies. This is a constant reminder to him. The family wants the whole thing to be over with and they would like to see swift and just punishment.

As described by their family members, the Bronsteins were loving parents and grandparents whose family was most important to them. Their funeral was the largest in the history of the Levinson Funeral Home and the family received over one thousand sympathy cards, some from total strangers. They attempted to answer each card personally. The family states the Mr. and Mrs. Bronstein were extremely good people who wouldn't hurt a fly. Because of their loss, a terrible void has been put into their lives and every day is still a strain just to get through. It became increasingly apparent to the writer as she talked to the family members that the murder of Mr. and Mrs. Bronstein is still such a shocking, painful, and devastating memory to them that it permeates every aspect of their daily lives. It is doubtful that they will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them."

IN THE  
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1984

No. 151

JOHN BOOTH  
a/k/a MARVIN BOOTH,

Appellant

v.

STATE OF MARYLAND,

Appellee

APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY

(THE HONORABLE JAMES W. MURPHY PRESIDING ON MOTIONS)  
(THE HONORABLE EDWARD J. ANGELETTI PRESIDING WITH A JURY)

APPELLANT'S BRIEF

Alan H. Murrell  
Public Defender

George E. Burns, Jr.  
Assistant Public Defender

Julia Doyle Bernhardt  
Assistant Public Defender

Counsel for Appellant

The statement also detailed the feelings of various family members about the circumstances of the crime and the character of the defendant. Again, an arbitrary factor was introduced into the proceedings when this evidence was admitted. Given the family members' emotional involvement, their feelings in these matters were the antithesis of the objective considerations mandated by the Eighth Amendment. They were statements of opinion influenced by emotional trauma and should have been excluded. Additionally, recommendations as to punishment should have been excluded. Md. Code. Art. 27, § 413(c)(iv)(1982); United States v. Pearson, 17 M.J. 149 (Ct. Mil. App. 1984).

**EVIII. THE MARYLAND CAPITAL PUNISHMENT STATUTE IS UNCONSTITUTIONAL.**

Appellant recognizes that this Court has concluded that the Maryland Capital Punishment Statute is consistent with the requirements of the Federal Constitution. Colvin v. State, 299 Md. 88, 126, 472 A.2d 953 (1984). Nevertheless, in at least two respects -- mandatoriness and a defendant's burdens -- the Maryland procedure is substantially different from procedures found constitutional by the Supreme Court. As Justice Marshall, joined by Justice Brennan, pointed out in his dissent to the Supreme Court's denial of a petition for writ of certiorari in Stebbing v. Maryland, \_\_\_ U.S. \_\_\_, 105 S.Ct. 276 (1984), serious flaws exist in Maryland's statutory scheme. Specifically, the statute places two different burdens of proof upon the defendant at

the sentencing stage; it prevents the sentencer from making an independent determination as to whether death is a proper penalty; and it "bars consideration of certain mitigating evidence when the sentencer decides whether to impose a life or death sentence." 83 L.Ed.2d at 212. Appellant urges reconsideration of these issues under Amendments Eight and Fourteen of the United States Constitution and Article 25 of the Maryland Declaration of Rights.

Art. 27, Sec. 413, as implemented by Md. Rule 4-343, not only places the burden on the capital defendant "to convince [the sentencer] that mitigating circumstances outweigh[] the aggravating circumstances," Tichnell v. State, 290 Md. 43, 61, 427 A.2d 991 (1981), but further requires the sentence of death once the bare existence of a statutory aggravating factor is established if the defendant fails to meet his burden of proof and persuasion. Thus, in this state a sentence of death may be mandated in circumstances where the sentencer is unconvinced that death is the appropriate punishment. This procedure is inconsistent with the Supreme Court's repeated insistence that state procedures assure "reliability in the determination that death is the appropriate punishment in a specific case." Woodson, supra, 428 U.S. at 305.

The Maryland statute requires the court or jury, as the sentencing body, to consider first "whether, beyond a reasonable doubt, any of the [ten enumerated] aggravating circumstances exist." Sec. 413(d). Once the existence of at

least one aggravating circumstance is found, the sentencing body "shall then consider whether, by a preponderance of the evidence, any of the following mitigating circumstances exist: ..." Sec. 413(g). If no mitigating circumstance is proven to exist by a preponderance of the evidence, the sentencer enters the word "Death" on the sentencing form. Sec. 413(h)(2); Md. Rule 4-343(d). If mitigating circumstances are found to exist, the court or jury must then "determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances." Sec. 413(h)(1). If the answer is negative, "the sentence shall be death." Sec. 413(h)(2); Md. Rule 4-343(d).

Maryland law, therefore, differs dramatically from the statutes of the majority of the states which permit the jury or judge to return a life sentence even where no "mitigating circumstances" are found or which place upon the prosecution the ultimate burden of persuasion on the question of life or death, in some instances beyond a reasonable doubt.<sup>17</sup> Indeed, the Maryland statute requires no independ

<sup>17</sup>Ala. Code Secs. 13-11-1 to 9; Del. Code tit. 11, Sec. 4209; Fla. Stat. Annot. Sec. 921.141; Ga. Code Annot. Sec. 27-2302; Ind. Code Ann. Sec. 35-50-2-9; Ky. Rev. Stat. Sec. 532.025 to .075; La. Code Crim. Pro. Ann. Arts. 905-905.9; Mo. Ann. Stat. Secs. 565.006 to .016; Neb. Rev. Stat. Secs. 29-2519 to 2525; Nev. Rev. Stat. Sec. 175.552 to 562; N.H. Rev. Stat. Sec. 630.5; N.M. Stat. Secs. 31-18-14, 31-20A-1 to 6; N.C. Gen. Stat. Secs. 15 A-2000 to 2003; Okla. Stat. tit. 21, Secs. 701.10 to .15; S.C. Code Secs. 16-3-20 to 28; S.D. Cod. Laws Secs. 23A-27A-1 to 47; Va. Code Ann. Secs. 19.2-264.2 to .5; Wyo. Stat. Secs. 6-4-102 to 103.

circumstances,<sup>18</sup> an issue not necessarily resolved by the mechanical parsing of aggravating and mitigating factors. "It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." Barclay, supra, 463 U.S. at 950. A sentencer may be unpersuaded that the crime itself warrants death; it may be unable to articulate those "compassionate ... factors stemming from the diverse frailties of humankind," Woodson, supra, 428 U.S. at 304. Because of the applicable standard of proof and its placement, the sentencer may be uncertain or even guessing as to whether death is the appropriate punishment in the specific case. In Maryland, that sentencer is nonetheless obliged to impose death unless the rigid formula is satisfied.

Justice Stevens stated the matter succinctly in his opinion respecting the denial of certiorari in Smith v. North Carolina, 459 U.S. 1056 (1982), in which a literal reading of a sentencing instruction was perceived as mandating "two entirely separate inquiries:"

"First, do the aggravating circumstances, considered apart from the mitigating circumstances, warrant the imposition of the death penalty? And second, do the aggravating circumstances outweigh the mitigating factors? It seems to me entirely possible that a jury might answer both of those questions affirmatively and yet feel that a comparison of the totality of aggravating factors with the totality of the

<sup>18</sup>Ark. Crim. Code, Secs. 41-1301; Miss. Code Ann. Secs. 79-19 (construed in Coleman v. State, 378 So.2d 640 (Miss. 1979)); N.C. Gen. Stat. Sec. 15A-2000(b)(1); Utah Code Secs. 763-206 to 207 (construed in State v. Wood, 648 P.2d 71, 83 (Utah 1982)).



mitigating factors leaves it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that 'death is the appropriate punishment in a specific case.' Lockett, supra, 438 U.S. at 601, (plurality opinion), quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell and Stevens, JJ.).

A quotation from a recent opinion by the Utah Supreme Court, which takes a less rigid approach to this issue, will illustrate my point. In State v. Wood, 648 P.2d 71, 83 (Utah 1982), that court wrote:

"It is our conclusion that the appropriate standard to be followed by the sentencing authority -- judge or jury -- in a capital case is the following:

"After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and you must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances."

These standards require that the sentencing body compare the totality of the mitigating against the totality of the aggravating factors. Not in terms of the relative numbers of the aggravating and the mitigating factors, but in terms of their respective substantiality and persuasiveness. Basically, what the sentencing authority must decide is how compelling or persuasive the totality of the mitigating factors are when compared against the totality of the aggravating factors. The sentencing body, in making the judgment that aggravating factors 'outweigh,' or are more compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the additional conclusion that the

death penalty is justified and appropriate after considering all the circumstances.

Id. at 1057.

In perhaps no other area of the law has the need for reliability in the decisional process been stressed as it has been in the capital punishment context. In other areas where the Supreme Court has perceived a need to minimize the risk of error in the adjudicatory process, it has not hesitated to place a heightened standard of proof upon the party seeking to change the status quo. See, e.g., Santosky v. Kramer, 455 U.S. 745 (1982); Addington v. Texas, 441 U.S. 418 (1979); In Re: Winship, 397 U.S. 358 (1970). The Maryland scheme, however, permits the capital sentencing decision to be made on the basis of the "preponderance of evidence standard," which "by its very terms demand[s] consideration of the quantity, rather than the quality of evidence," Santosky v. Kramer, supra, at 764, and "is quite consistent with want of belief." Trickett, "Preponderance of Evidence and Reasonable Doubt," 10 Dick.L.Rev. 76 (1966). Moreover, it places the ultimate burden of both production and persuasion on the capital defendant, who must be executed if he fails in that regard.

**XIX. THE SENTENCE IMPOSED IN THIS CASE IS EXCESSIVE AND DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES CONSIDERING THE CRIME AND THE DEFENDANT.**

Section 414(e)(4) charges this Court with the responsibility of determining "[w]hether the sentence of death

**OPPOSITION**

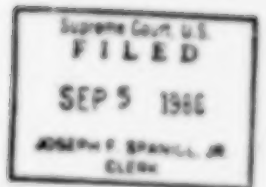
**BRIEF**

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**ORIGINAL**

No. 88-5020



IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN BOOTH,

Petitioner

v.

STATE OF MARYLAND,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF MARYLAND

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# QUESTIONS PRESENTED

1. Whether the trial court's refusal to give the "no adverse inference" instruction in the form requested by Petitioner was consistent with due process?
2. Whether the prosecutor's comments about Petitioner's statements in allocution were proper and consistent with due process?
3. Whether victim impact evidence may be introduced in a capital sentencing proceeding consistent with the Eighth and Fourteenth Amendments to the United States Constitution?
4. Whether the Maryland Court of Appeals has consistently interpreted the Maryland Death Penalty Statute so as to avoid offending the Eighth and Fourteenth Amendments to the Federal Constitution?
5. Whether the allocation of the burden and standard of proof in the Maryland Death Penalty Statute is constitutional?

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No. 86-5020

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IN THE  
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1986

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JOHN BOOTH,

Petitioner

v.

STATE OF MARYLAND,

Respondent

---

BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF MARYLAND

---

STATEMENT OF THE CASE

Petitioner was convicted of the first degree premeditated murder of Irvin Bronstein, the felony-murder of Rose Bronstein, the robbery of the two victims, and conspiracy to rob the victims. A jury determined that the death sentence should be imposed for the death of Mr. Bronstein. For the felony-murder of Mrs. Bronstein, the trial judge imposed a life sentence consecutive to any sentences Petitioner was presently serving. The trial judge also imposed three consecutive 20-year sentences for the two robbery convictions and the conviction of conspiracy to rob. On May 7, 1986 the

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Court of Appeals of Maryland affirmed Petitioner's convictions and sentences. Booth v. State, 306 Md. 172, 507 A.2d 1098 (1986).

REASONS FOR DENYING THE WRIT

I. and II.

THE TRIAL COURT PROPERLY REFUSED TO GIVE PETITIONER'S INSTRUCTION AS REQUESTED BECAUSE IT WAS CONFUSING AND AN INCORRECT STATEMENT OF LAW; AND THE PROSECUTOR'S COMMENTS WERE PROPER UNDER THESE CIRCUMSTANCES.

Sentencing facts:

In order to provide a framework for addressing Petitioner's first two contentions, it is necessary to set forth the following sequence of sentencing events: After Petitioner had been found by the jury to be guilty as a principal in the first degree of the premeditated murder of Mr. Bronstein, that same jury sat to determine whether Petitioner's sentence should be life imprisonment or death. During its case, the State incorporated by reference all evidence produced during the trial on the issue of guilt or innocence and introduced as joint exhibits, the presentence investigation report and the victim impact statement. After Petitioner's mother, grandmother, and the Chairman of the Maryland Parole Commission had testified, Petitioner and his counsel approached the bench. Counsel repeated on the record the advice previously given to Petitioner concerning his right to testify. Counsel told Petitioner that if he decided not to testify he still had "the right to allocute," which was explained as "the right to tell the jury why you feel they



should not execute you." Counsel said that the court would instruct the jury that Petitioner's failure to testify could not be held against him, but when counsel asked the court to confirm the legal accuracy of that statement the judge replied: "No, I don't believe that's accurate. That only held true for the guilt or innocence phase of this trial." The court said it was "directly up to Mr. Booth whether he wants to testify or not at this point. Nothing will be said to the jury about that." After further discussion the court agreed with Petitioner's request that he be allowed to consider the matter overnight and advise the court of his decision the following morning.

The next morning Petitioner said that he would not testify but that he would allocute. At the court's request Petitioner explained the difference in his own words:

"[THE DEFENDANT]: Well, if I testify, I would be subject to cross-examination by the counsel for the State and if I allocute, I can't be cross-examined -- well, I won't be cross-examined.

THE COURT: All right. Do [sic] you will make an argument to the jury concerning whatever you want to say to the jury; is that correct?

THE DEFENDANT: Yes sir.

THE COURT: All right. You understand that you will not be under oath and you will not be examined by anyone as to what you say to the jury?

THE DEFENDANT: Yes, sir."

Petitioner reiterated that he did not wish to testify, but that he did wish to allocute.

The jury was then brought into the courtroom and told by the judge that "the defendant has the right to address you and say whatever it is he wishes to say to you concerning the matter that you are going to be deliberating on." Petitioner, who had elected not to testify at the guilt or innocence phase, opened his statement to the jury by saying that "I finally get a chance to say something to you." In his address, which covers seven and one-half pages of transcript, Petitioner denied killing anyone. He admitted only to having entered the Bronstein home late in the evening, after the murders had been committed, in order to steal. He attacked the prosecutors for fabricating statements of witnesses and for putting words in their mouths. He said his general occupation was being a thief but he was not a robber or murderer. In its summation the State told the jury, over objections by defense counsel, that Petitioner's statement was not evidence, that Petitioner, in order to avoid cross-examination, had not taken the witness stand, and that Petitioner had lied to the jury and should not be believed.

No adverse inference instruction:

Petitioner requested that the court give the following instruction at his sentencing:

"Every citizen charged with a crime has the right to remain silent at trial, including the sentencing hearing. This is because it is the prosecutor's responsibility at a sentencing to prove the citizen guilty of an aggravating circumstance beyond a reasonable doubt. It is not the citizen's responsibility to prove himself innocent of any aggravating circumstances, nor is it the citizen's responsibility to prove that life imprisonment is the appropriate punishment.

[Petitioner] did not testify in this phase, as was his right. You shall not draw any inference of guilt from this choice. You shall not allow this choice to prejudice him in any way. If you use his choice not to testify in any manner, you will have violated your oath that you have taken as jurors." Appendix to Petition at 58.

The trial judge had advised counsel that the above instruction, as well as two others requested by Petitioner, would not be given. In charging the jury at sentencing the court did not comment at all on the effect, if any, upon the jury's deliberations of Petitioner's having allocuted but not testified. Defense counsel's sole exception to the court's instructions was based on the court's "failure to give our requested instructions in full, in the way they are written."

Because the instruction as requested did not correctly articulate the law as it applied in the instant case and because it was very confusing, it was properly denied. As the Maryland Court of Appeals explained:

"It presupposed that Booth had remained silent when Booth had in fact allocuted. To give the instruction in the form requested would have been confusing and an incorrect statement of law under the circumstances here. In his allocution Booth denied having murdered Mr. Bronstein. The jury had just found beyond a reasonable doubt that Booth had murdered Mr. Bronstein with premeditation. The jury could properly consider, from the allocution, that Booth had not [sic] remorse and thereby reduce the weight to be given to the mitigating factors which the jury had found did exist." 306 Md. at 210, footnote omitted.

Thus, contrary to Petitioner's assertion, the Maryland Court of Appeals did not rule that Petitioner "waived any

right to a jury instruction when he elected to allocute." Petition at 4. Nor did it address the question "whether a no-adverse-inference instruction is constitutionally compelled in capital sentencing proceedings." Id. Rather, the Maryland Court of Appeals simply and correctly ruled that the instruction in the form requested by Petitioner was confusing and an incorrect statement of the law under the circumstances. Because the question which Petitioner addresses to this Court was "not pressed or passed upon below," this Court should decline to grant certiorari on that ground. See Illinois v. Gates, 462 U.S. 213, 216-225 (1983).

Prosecutor's comments about Petitioner's unsworn statements in allocution:

Petitioner maintains that the Maryland Court of Appeals erred in holding that the prosecutor's comments about the nature of Petitioner's unsworn statements in allocution were not within the bounds of permissible jury argument. In urging this Court to grant certiorari on the issue, he asserts that "[n]o court has so completely ignored a defendant's Fifth Amendment rights as the Maryland Court of Appeals has in the instant case." Petition at 7. A reading of the opinion by the Maryland Court of Appeals on the matter, however, flatly belies Petitioner's assertion.

The court began by discussing the nature and purpose of the allocution rule<sup>1</sup> as it applies to a death penalty proceeding:

"The obvious purpose of Rule 4-343(d) is to afford the death penalty eligible, convicted murderer the opportunity to make an unsworn statement in mitigation of the death penalty without being subject to cross-examination. In this respect the statement is similar to closing argument, but it is not completely analogous to closing argument because the factual content of the allocution is not limited, in general, to the record in the case, inferences therefrom, and matters of common human experience. In that allocution is unsworn and is not subject to cross-examination, it is not testimony in the conventional sense. Nevertheless, allocution may be considered by the sentencing authority. Under Md.Code (1957, 1982 Repl.Vol., 1985 Cum.Supp.), Art. 27, § 413 (g)(4) the sentencing authority may find by the preponderance test '[a]ny other facts which the [sentencing authority] specifically sets forth in writing that it finds as mitigating circumstances in the case.' In Booth's case, after the jury had found the aggravating circumstance of murder in the course of robbery, the jury was free to find as a mitigating circumstance such aspect of the content of Booth's allocution on which the jury could unanimously agree, simply by specifically setting it forth on the sentencing form. Further, if the jury found any such mitigating circumstance in the allocution the jury was obliged to weigh that mitigating factor in determining whether the sentence should be life or death." 306 Md. at 198-199.

The court found that the prosecutor's contrasting of Petitioner's allocution with the elevated level of evidence

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<sup>1</sup> Maryland Rule 4-343(d) is reproduced in the Appendix to Petitioner's brief, at 9.

which is sworn testimony subject to cross-examination was legitimate jury argument. The court also emphasized that the prosecutor did not tell the jury that it could not consider the content of Petitioner's statement. Rather, the prosecutor urged the jury to reject the content of the allocution as false because it was unsworn and was not subject to cross-examination. In this regard, the court specifically held:

"Because the content of a convicted defendant's allocution may be considered by the jury or court in mitigation, the State, as a matter of non-constitutional Maryland law, may comment on that allocution and urge its rejection by arguments which may include attacking the defendant's credibility by explicit reference to the lack of an oath and to the lack of testing by cross-examination." *Id.* at 199.

The court next determined that the prosecutor's comments did not constitute a comment upon Petitioner's failure to testify in violation of Maryland's prohibition against self-incrimination. The court noted that in order for Petitioner to fashion his argument, he combined the prohibition against adverse commentary on silence established by this Court in *Griffin v. California*, 380 U.S. 609 (1965), with the recognition by this Court in *Estelle v. Smith*, 451 U.S. 454 (1981), that there can be self-incrimination after a finding of guilty. In rejecting this argument, the court explained:

"Booth's contention ignores the fact that he did not remain silent and that the prosecutor's comments were directed at Booth's allocution. When more bluntly stated Booth's argument is that the law must pretend that he remained silent because Md. Rule 4-343(d) benefitted him by allowing him to make for the jury's consideration a statement which was unsworn



and not subject to cross-examination. We will not construe this State's prohibition against self-incrimination to incorporate such a fiction." Id. at 203.

The court concluded its analysis by addressing "whether the prohibition against compulsory self-incrimination in the Fifth Amendment to the United States Constitution, as applicable to Maryland through the Fourteenth Amendment," would require a different outcome. The court assumed that, if Petitioner had neither testified nor allocuted at the sentencing proceeding, the rule announced in Griffin, supra, would continue to apply. Also, if Petitioner had testified under oath and was subject to cross-examination at his sentencing, he would have waived the Fifth Amendment privilege. The court found that allocution under Maryland Rule 4-343(d) "falls between the two" [rule announced in Griffin and waiver by testifying] and held that:

"Booth's allocution is more like testimony than silence and for Fifth Amendment purposes is testimonial, carrying with it, at a minimum a waiver of any privilege to avoid comment by the prosecutor on the allocution." Id. at 203.

Aligning itself with the majority position that the Fifth Amendment does not prohibit comment by a prosecutor on unsworn statements of fact made by a pro se defendant, see, e.g., Jones v. State, 391 So.2d 983 (Miss.), cert. denied, 449 U.S. 1003 (1980); Bontempo v. Fenton, 693 F.2d 954 (3rd Cir. 1982), cert. denied, 460 U.S. 1055 (1983); and cases cited at 306 Md.

at 209, the Maryland Court of Appeals held that the prosecutor's argument did not violate Petitioner's Fifth Amendment rights.

In short, the Maryland Court of Appeals did not ignore or trample upon Petitioner's Fifth Amendment rights. It carefully analyzed the nature of allocution and the contents of Petitioner's unsworn statements in light of the protections afforded by the Fifth Amendment. In a well-considered decision it correctly held that Petitioner's unsworn statements in allocution in which he expressed no remorse, but denied committing the murders for which he had already been found guilty were testimonial in nature, carrying a waiver of any privilege to avoid comment by the prosecutor on the allocution. Because the Maryland Court of Appeals correctly found no constitutional violation in the prosecutor's comments, there is no need for further review by this Court.

III.

THE CONSIDERATION OF VICTIM IMPACT EVIDENCE  
WAS CONSISTENT WITH THE EIGHTH AND  
FOURTEENTH AMENDMENTS TO THE UNITED STATES  
CONSTITUTION.

Petitioner asserts that the admission of the victim impact statement into evidence at his sentencing proceeding injected an arbitrary factor into the sentencing process in contravention of the Eighth and Fourteenth Amendments to the United States Constitution. However, in light of the legislative declaration of relevancy by the Maryland General Assembly, and the statutorily prescribed system of guided

discretion in the Maryland Death Penalty Statute, Petitioner's contention is without merit.

Maryland Code (1957, 1982 Repl.Vol., 1984 Cum.Supp.), Article 41, §124(d) specifically provides that in a capital case a victim impact statement shall be considered by the sentencing authority. The statute mandates that the following information be furnished to the sentencing authority:

- "(i) Identify the victim of the offense;
- (ii) Itemize any economic loss suffered by the victim as a result of the offense;
- (iii) Identify any physical injuries suffered by the victim as a result of the offense along with its seriousness and permanence;
- (iv) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;
- (v) Identify any requests for psychological services initiated by the victim or the victim's family as a result of the offenses; and
- (vi) Contain any other information related to the impact of the offense upon the victim or the victim's family that the court requires." Article 27, §124(c)(3).

Implicit in the statutory requirement is a legislative determination that in serious criminal cases in Maryland an important and relevant consideration at sentencing is the impact which a victim or his family suffers as a result of criminal conduct. This is consistent with the evolving public outcry concerning the criminal justice system which too often forgets the victim of a crime. Attempts to right this particular wrong have resulted in the enactment by a number of

states of procedures whereby victim impact statements are utilized in the sentencing process. See, State Legislation in Aid of Victims and Witnesses of Crime, 18 Journal of Legislation, 394, 402 (1983).

Petitioner, in assailing the statute as unconstitutional, has a heavy burden in overcoming the presumption of constitutionality. Gregg v. Georgia, 428 U.S. 153, 176 (1976). Deference is owed to the decisions of State legislatures particularly where the specification of punishment is reviewed for "these are peculiarly questions of legislative policy." Gregg, 428 U.S. at 176, quoting Gore v. United States, 357 U.S. 386, 393 (1958).<sup>2</sup> That the sentencing authority is required to consider the victim impact statement does not lessen the constitutionality of the process for the determination of the sentence. The guidance of Article 27, §413 remains in place: in a bifurcated proceeding, after determining guilt a sentencer must then determine the existence of an aggravating factor beyond a reasonable doubt, the existence of mitigating factors under a preponderance standard, and then balance one against the other to determine the appropriate

<sup>2</sup> In support of his contention that the consideration of victim impact evidence is unconstitutional, Booth cites People v. Levitt, 203 Cal.Rptr. 276, 387 (Cal.App. 1984), Muckie v. State, 211 S.E.2d 361 (Ga. 1974), and People v. Ramirez, 457 N.E.2d 31, 37 (Ill. 1983). Neither California, Georgia, nor Illinois had legislation rendering victim impact evidence relevant at the time these cases were decided. A review of these decisions reflects no finding of constitutional infirmity, but rather impropriety by way of a relevancy determination. As there has been a legislative declaration of relevancy in Maryland, these decisions are unpersuasive on the ultimate issue raised here.

sentence. The inclusion of victim impact evidence does not inject an arbitrary factor, but merely assists the sentencer in assessing the weight to be accorded each factor as a circumstance of the crime. There is no indication on this record that the sentence imposed was the product of unguided discretion on the part of the sentencing judge due to the receipt of victim impact evidence.

Petitioner cites Moore v. Zani, 722 F.2d 840 (11th Cir. 1983), rehearing granted, 722 F.2d 853 (1984), for the proposition that "[a]ny exploration into the character of the victim [is] fraught with constitutional danger." Id. at 846. However, in affirming the sentence imposed, the Eleventh Circuit stated:

"We cannot say that the trial judge's balancing of the relevancy of Mr. Allen's testimony against its prejudice was constitutionally faulty. We are not prepared to hold that it violates the constitution for the jury to know who it was that was the victim of the murder." Id. at 846.

Here, the sentence was imposed under properly guided discretion under the terms of the statute. As in Moore, the trial judge's balancing of the relevancy of the victim impact evidence against its prejudice was not constitutionally faulty.

IV. and V.

THE RECENT CLARIFICATION OF THE OPERATION OF THE MARYLAND CAPITAL SENTENCING STATUTE DOES NOT CONSTITUTE A CHANGE IN THE LAW AND FIRMLY ESTABLISHES THE CONSTITUTIONALITY OF THE ALLOCATION OF THE BURDEN OF PERSUASION.

Petitioner contends that the Maryland Court of Appeals, through announcing its decision in Foster v. State, 304 Md. 439, 499 A.2d 1236 (1985), violated both the Fourteenth Amendment to the Federal Constitution by rendering the Maryland Capital Punishment Statute "unduly vague with respect to those persons convicted prior to the reconstruction," (Petition at 23), and the Eighth Amendment to the Federal Constitution by rendering "the imposition of the death penalty on some persons arbitrary and capricious." Id. In support of these claims, Petitioner asserts that the Maryland Court of Appeals' decision in Foster constituted a "reconstruction" of the statute which varied the burden of persuasion from that employed in Petitioner's case. He contends that the procedure employed in his case placed the ultimate burden of persuasion upon him with regard to obtaining a life sentence, instead of death.

The argument which he presents to this Court is verbatim that recently made by other petitioners from Maryland: E.g., John Norman Huffington v. Maryland, No. 85-6648, cert. denied, \_\_\_ U.S. \_\_\_, July 7, 1986; Vernon Lee Evans, Jr. v. Maryland, No. 85-6649, cert. denied, \_\_\_ U.S. \_\_\_, June 30, 1986; and Doris Ann Foster a/k/a Muketa Leah Ansara v. Maryland, No. 85-6650, \_\_\_ U.S. \_\_\_, cert. denied, June 30,



1986. As the State of Maryland explained in its briefs in opposition to the petition for writs of certiorari in these latter cases, a review of Maryland Court of Appeals opinion in Foster, and together with prior decisions interpreting Art. 27, §413 of the Maryland Annotated Code, reflects that the Foster opinion did not change the law. Rather, the opinion restated that which had been pronounced in Tichnell v. State, 287 Md. 695, 730, 415 A.2d 830 (1980), the first decision rendered by the Court of Appeals under the current death penalty statute. As the law never changed, there was no unconstitutional vagueness, arbitrariness or capriciousness, or improper allocation of burden in Petitioner's case. As a result, review is unwarranted.<sup>3</sup>

In Tichnell v. State, 287 Md. at 730, 415 A.2d at 849, the Maryland Court of Appeals stated:

"Because the State is attempting to establish that the imposition of the death penalty is an appropriate sentence, the statute places the risk of nonpersuasion on the prosecution with respect to whether the aggravating factors outweigh the mitigating factors."

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<sup>3</sup> Petitioner's challenge relates solely to the facial validity of the Maryland capital punishment statute. As noted by the Maryland Court of Appeals in its decision on Motion for Reconsideration, Foster, et al. v. State, 305 Md. 306, 503 A.2d 1326 (1986), any challenge to the instructions has been waived under State law for failure to raise the issue at trial or on direct appeal (Apx. 79-80). It is clear that Petitioner would have been entitled to an instruction informing the jury that in weighing aggravating and mitigating, if there were an even balance, the sentence should be life, had one been requested.

This holding was reiterated by the court in Trimble v. State, 300 Md. 387, 415 n.16, 478 A.2d 1143, 1157 n.16 (1984), cert. denied, \_\_\_\_ U.S. \_\_\_\_, 105 S.Ct. 1231, 84 L.Ed.2d 368 (1985), where it stated:

"In Tichnell I, we also construed Section 413(h)(2), which provides that the trier of fact shall determine whether 'the mitigating circumstances outweigh the aggravating circumstances,' to place the burden of persuasion on the prosecution."

The holding of the Court of Appeals in Foster v. State, supra, did not constitute a deviation from this previously announced law. Rather, the Court merely reiterated that when evidence is weighed, no burden is imposed upon either party. In this ultimate balancing, if the aggravating factors outweigh the mitigating factors the sentence is death; if the mitigating factors outweigh the aggravating factors, the sentence is life; if the mitigating factors and aggravating factors are in a state of even balance, the appropriate sentence is life because the State (as the moving party) bears the risk of nonpersuasion.<sup>4</sup> As there was no deviation from

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<sup>4</sup> In support of his contention under the Fourteenth Amendment, Petitioner cites Ashton v. Kentucky, 384 U.S. 195 (1966), and Hicks v. Oklahoma, 447 U.S. 343 (1980) for the proposition that a limiting construction cannot be applied to affirm the decision in the case in which the limitation was announced. The flaw in Petitioner's contention, aside from the fact that there was no reconstruction here, however, is that the Ashton restriction applies only where the new interpretation saves that which would have been unconstitutional. Assuming that the Foster decision transferred the burden of persuasion to the State, there remains no infirmity since imposing the burden on the defendant is not unconstitutional. See Proffitt v. Florida, 428 U.S. 242 (1976) (scheme in which death is presumed after one or more aggravating circumstances is found unless overridden by mitigating factors constitutional). Cf. Patterson v. New York, 432 U.S. 197 (1977).

existing law, the Maryland Capital Punishment Statute is not overly vague in contravention of the Fourteenth Amendment, and does not result in the arbitrary and capricious imposition of sentence in violation of the Eighth Amendment.<sup>5</sup> There is simply nothing in the reiteration of prior holdings in the Foster opinion that would serve to violate the Federal Constitution.

Petitioner additionally contends that review of his case is warranted because he was tried under the interpretation of the law that existed prior to the Foster decision, an interpretation that he alleges is unconstitutional. However, as noted above, Foster did not initiate any change in the law. It was the law from the time of the first decision under the existing statute. As a result, his contention on this basis must be rejected.

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<sup>5</sup> Petitioner's reliance upon Bouie v. City of Columbia, 378 U.S. 347 (1964), in asserting that at the time he was sentenced (prior to Foster) the statute was unconstitutionally vague is misplaced. In Bouie, the South Carolina appellate court expanded the definition of the trespass statute beyond its specific terms in order to find the evidence sufficient in Bouie's case. Here, on the other hand, the judicial interpretation was not contrary to the legislative enactment. See Stebbing v. Maryland, \_\_\_ U.S. \_\_\_, 105 S.Ct. 276, 280, 83 L.Ed.2d 212, 217 (1984) (Marshall, J., dissenting on denial of certiorari) (Maryland statute is silent as to burden on ultimate weighing). Moreover, the South Carolina courts had never interpreted the trespass statute to include Bouie's conduct until after Bouie's arrest. The Maryland Court of Appeals, on the other hand, had interpreted the statute with respect to burdens prior to Petitioner's trial.

He further asserts that even if the burden were properly allocated to the State, the statute is nevertheless unconstitutional because the ultimate weighing does not require a finding "beyond a reasonable doubt." However, Petitioner once again erroneously talks in terms of burden with respect to a weighing of one set of circumstances against another. As noted by the Maryland Court of Appeals, "ordinarily in such a balancing process, a court simply determines which side outweighs the other, without being concerned with how much or how clearly one side may outweigh the other." Foster v. State, 384 Md. at 477. The Court of Appeals had earlier rejected an identical contention in Tichnell v. State, 387 Md. at 732-733, 415 A.2d at 849-850, relying upon this Court's decision in Patterson v. New York, 432 U.S. 197 (1977). In Patterson, this Court

"decline[d] to adopt as a constitutional imperative, operative country wide, that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch." 432 U.S. at 209-10.

Under the Maryland scheme, the State is required to prove beyond a reasonable doubt that the defendant is guilty of first degree murder, that he or she was a principal in the first degree or contracted for the murder of another, and that at least one aggravating factor is present. The defendant is then provided an opportunity to present evidence to help the

jury find the existence of any mitigating factor established by a preponderance of the evidence.<sup>6</sup> It is then up to the sentencer to weigh the evidence in aggravation against the mitigating factors found to exist under a preponderance standard in order to determine the ultimate sentence. There is no unconstitutional allocation of burden or standard in this scheme. As a result, review of the last two contentions presented by Petitioner is unwarranted.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari filed herein be denied, review being neither desirable nor in the public interest.

Respectfully submitted,

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<sup>6</sup> The defendant has no obligation to produce evidence or prove mitigating factors. As stated in Foster, 304 Md. at 474, 499 A.2d at 1254: "[R]egardless of what evidence a defendant himself may or may not produce, or regardless of any mitigation argument he may or may not advance, if the jury perceives from the case a fact or circumstance concerning the crime or the defendant, which the jury deems to be mitigating, it may treat it as such. As to mitigation, it is only the risk of non-production or non-persuasion which the defendant bears."

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of September, 1986, the Brief in Opposition to the Petition for Writ of Certiorari was mailed to the court and copies thereof were mailed, postage prepaid, to George E. Burns, Jr., Julia Doyle Bernhardt, and Laurie I. Mikva, Assistant Public Defenders, 312 N. Eutaw Street, Baltimore, Maryland 21201.

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# **JOINT APPENDIX**

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5  
No. 86-5020

Supreme Court, U.S.  
FILED

DEC 4 1986

JOSEPH P. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

JOHN BOOTH, *Petitioner*,  
v.

STATE OF MARYLAND, *Respondent*.

On Writ Of Certiorari To The  
Court Of Appeals Of Maryland

**JOINT APPENDIX**

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**PETITION FOR WRIT OF CERTIORARI**  
**FILED JULY 7, 1986**  
**CERTIORARI GRANTED OCTOBER 14, 1986**

154124

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## RELEVANT DOCKET ENTRIES

## Proceedings

1983

- July 7 1 Indictment filed.  
 Aug. 3 2 Notice of intention to Seek Death Penalty filed.  
 Aug. 15 3 Defendant's Request for Discovery and Motion to Produce Documents.  
 Nov. 3 4 Motion for Independent Psychological Exam. filed. Motion for Independent Psychiatric Exam. filed.  
 Nov. 14 5 Motion for Additional Independent Psychological Examination filed.

1983

- Jan. 31 6 Memo. in support of Defendant's Motion to Dismiss the State's Election to Seek the Death Penalty filed.  
 Motion for Individual Voir Dire in Camera filed.  
 Jan. 31 7 Motion to require the State to comply with Rule 772, Section C. Prior to Trial and for an In-Camera Review of State files filed. Motion to Dismiss Notice of Intention to Seek the Death Penalty for failure to provide for Judgment Non Obstante Verdicto or New Trial file. Motion to Compel State to reveal procedure by which it elects to see the Death Penalty filed. Motion for Additional Peremptory Challenges filed. Motion for Production of Witness Statements filed. Motion for Production of Photographic copies of Scene filed. Motion to Dismiss the State's Election to seek the Death Penalty filed. Motion for Exculpatory Material with regard to State's Witnesses Motion to Examine all Evidence in the Possession or control of the State filed. Motion to Compel State to reveal Homicide Statistics filed. Motion for Additional Independent Psychological Examination filed. Motion for Tangible Evidence before Trial Rule (742) filed.  
 Apr. 23 8 Motion for Mistrial heard and Granted, Murphy, J.

## RELEVANT DOCKET ENTRIES

## Proceedings

1984

- May 1 9 Motion to Dismiss filed.  
 May 2 10 Motion to Dismiss Heard and Denied Motion to be Appealed.  
 May 2 11 Notice of Appeal to the Court of Special Appeals.  
 Sept. 13 12 Mandate-Court of Special Appeals No. 62, September term 1984.  
 Opinion: Judgment Affirmed.  
 Mandate issue: 7-10-84.  
 Sept. 18 13 Motion for Bifurcated jury Heard and Denied, Angeletti, J.  
 Arraigned and Pleads: Not Guilty Jury Trial. Voir Dire Administered. Voir Dire began Continued until 9-19-84.  
 Sept. 19 14 Individual Voir Dire completed Voir Dire administered to 2nd panel.  
 Sept. 20 15 Individual Voir Dire Completed as to 2nd panel.  
 Sept. 24 16 Voir Dire administered to 3rd panel. Individual Voir Dire completed as to 3rd panel.  
 Sept. 25 17 Jury Sworn, Angelette, J. Continued till 10-2-84.  
 Oct. 2 18 State Rests: Motion to exclude hearsay heard and denied, Angeletti, J.  
 Motion for judgment of Acquittal heard and denied, Angeletti, J.  
 Oct. 3 19 Jury Begins deliberation-continued until 10-4-84.  
 Oct. 4 20 Verdict: Guilty 1st count-Felony Murder continued to 10-9-84, Angeletti, J.  
 Oct. 9 21 Motion to dismiss Death Penalty denied, Angeletti, J. Memorandum in support of Motion to bar import statement filed. Defendant's Motion to limine & Continuing Objection to bar improper prosecutorial argument filed. Motion for Directed finding on the allegation that the Defendant committed more than one offense of Murder in the first degrees arising out of the same incident filed.

# RELEVANT DOCKET ENTRIES

## Proceedings

1984

- |         |    |  |
|---------|----|--|
| Oct. 16 | 22 | Defendant's Requested instructions filed. Findings & Sentencing determination filed. Verdict: Death. Judgment: held subcuria, Angeletti, J.  |
| Oct. 19 | 23 | Motion for New Trial filed. Motion for New Trial denied, Angeletti, J. Defendant's Motion for New Sentencing filed. Motion for New Sentencing denied. Angeletti J. Judgment: Death-To be executed during the week of December 17, 1984, Angeletti, J. Report of trial Judge filed. Copy of Commitment & Death Warrant filed. Copy of Corrected Commitment filed. |
| Oct. 22 | 24 | Copy of Sentencing Guide Lines filed.  |
| Oct. 19 | 25 | Notice of Appeal to the Court of Special Appeals.  |
| Oct. 19 | 26 | Stay of Execution filed.   |

# IN THE CIRCUIT COURT FOR BALTIMORE CITY

18318813-17

STATE OF MARYLAND  
v.

JOHN BOOTH a/k/a Marvin Booth

*Defendant*

## EXCERPTS OF TRANSCRIPT ON MOTION TO EXCLUDE VICTIM IMPACT STATEMENT, OCTOBER 9, 1984 AND OCTOBER 15, 1984

\* \* \*

[68] Mr. Brown: Your Honor, thank you. May it please the Court, with regard to—I believe the Court would have in its possession—two memos relating to that motion. One is the earlier memo. The second, the later memo, submitted recently, I think perhaps today—

THE COURT: Yes, sir, that was this morning.

MR. BROWN: Yes, Your Honor.

THE COURT: I might just, as an aside, compliment counsel on the eruditeness, if there is a word like that, of the motion. The memorandum are very exhaustive, very thorough, excellently done. Counsel should be commended for that.

MR. BROWN: Thank you, Your Honor.

MS. SHEARER: Thank you, Your Honor.

MR. BROWN: Your Honor, the thrust of our motion in this regard to bar the use of the victim impact statement is basically grounded on in two areas. First of all, we take the position, Your Honor, recognizing full well that under the—under Article 41, Section 124, that particular statute does in fact indicate



that in any death penalty case wherein it is requested a victim impact statement, presentence statement, including victim impact statement, shall be considered by the Court or jury, before whom the separate sentencing proceeding [69] is conducted. Under Article 27, Section 413. Looking at that, Your Honor, and recognizing the existence of that, it is still our contention and position that to permit the use of a victim impact statement in this case or in any capital case would constitute an impermissible criteria, upon which the jury would be using to return a verdict of—of death.

I think, very clearly, Your Honor, that the cases—and I would simply point the Court to the case of *Henry v. State*, 273 Md., 131, which was not in fact a—a capital case, but, nevertheless, in *Henry*, apparently, the jury returned a verdict of assault with intent to murder. I'm sorry. Of larceny of an automobile and larceny of the use of an automobile. The Defendant was acquitted of assault with intent to murder and robbery-deadly weapon. However, in sentencing, apparently, the Judge in the *Henry* case felt that the Defendant in that case committed more—had done more than what he was actually convicted of.

In that sentence, what happened was, the Judge gave him consecutive maximum terms on the two convictions that he had. And in addressing that, the Court indicated that sentences within the maximum specified by law do not constitute cruel and unusual punishment, unless dictated by passion, prejudice, ill will, or some other unworthy motive. And I think the Court tended to look at the—the position that the trial court took in imposing the sentence. Even though the Court imposed [70] the maximum sentence under the statute, the appellate court looked at that sentencing procedure from the standpoint and felt that it was in fact generated or based upon passion or prejudice or ill will. And I think that that is in fact the effect that a victim impact statement will have, if in fact it is permitted to be submitted to the jury.

In addition to that, Your Honor, I think that what will in effect happen is that by use of the victim impact statement

another aggravator will in fact be used, where the statute does require one to be used, and I think the victim impact statement would certainly do nothing but add another aggravator.

In addition to that, we take the position, Your Honor, that even if the Court were to rule that the victim impact statement is admissible and should be submitted, we take the position, Your Honor, that that is admission of that victim impact statement, in this case, is tantamount to an *expo facto* law, and basically that should not be permitted as unconstitutional.

The basis for that, Your Honor, is the fact that this crime occurred in May of 1983. The victim impact, or the use of the victim impact at sentencing was not passed until 1984. I'm sorry. July of 1983. It certainly can't be argued, although I know that there have been cases which indicate that in fact change or the statute that is being under consideration would have an ameliorating effect on the Defendant, or the [71] Defendant's rights, then that would not be an *expo facto* situation. However, certainly, it is our contention, that would not have an ameliorating position with regard to this particular case.

What in fact the impact statement would do, again, as I indicated, Your Honor, is to add another aggravator. It also certainly would go toward inflaming the passions and the prejudice of the jury in a—in a sentencing procedure.

It is somewhat ironic, Your Honor, again we have the use of a victim impact statement, and just for argument's sake, in this particular case, you have one set of facts wherein there are family members of the victim. They care about the victim, obviously, and they're very, very concerned, and certainly the victim's death, perhaps, has hurt them tremendously.

But what, in effect, would happen, if in fact there were no family members there? Would we still have a victim impact statement, and would it have the same effect in that case as it would in this case? And I think under those circumstances, Your Honor, the use of the victim impact statement would be



totally unfair, and I would urge the Court not to use or not to permit it to be used in the sentencing proceeding in this case, knowing full well, Your Honor, of course, what the section, Article 41, 124 has said.

I simply think, and I think that in addition the [72] *expo facto* aspect of it, I think that it creates an impermissible criteria, one that was not envisioned by the legislature, because what in effect it does, certainly adds another aggravator to the aggravators that have already been set up by the—by the legislature.

In addition, Your Honor, in the event that the Court is in fact inclined to deny the motion, admit the use of the victim impact statement, Your Honor, I would ask the Court, or we would ask the Court, if that is done, that it be done in its written form as opposed to testimonial form.

THE COURT: In what form?

MR. BROWN: Written as opposed to testimonial.

THE COURT: Why?

MR. BROWN: Well, again, Your Honor, I think that with regard to putting it in, in testimonial form, I think, again, that would certainly serve to highlight and inflame the jury by the testimony of whatever or whoever would be using. The State would be using it to put that information before the jury.

I would suggest to the Court that the better approach, if in fact the Court is inclined to permit it, the better approach would be to use the written form. And the other thing, the other part of this—well, I think it would simply be better, and perhaps less enraging than perhaps the live testimony.

[73] MR. DOORY: Looking in reverse, Your Honor, as to argument B, Your Honor, the State is going to ask, of course, the Court to deny this motion, and the State has no objection to presenting the victim impact statement as prepared by the Parole and Probation Department, not for Mr. Brown's argument, because I think it might be possible and proper for us to

present the victims' live testimony, but the pain that they felt and the pain of having to testify for Mr. Bronstein, the pain of having to watch the testimony for Mrs. Bricker, is pain enough. If it can be done in written form so as to alleviate their pain a little bit, the State is willing to proceed in that manner.

As to Mr. Brown's argument, Your Honor, I think you must presume that the recently enacted law is in fact constitutional until told otherwise by the Court of Appeals; that it is the legislature's wisdom that this information should be before the jury; and that it should fit in with the scheme that the legislature devised for us to follow anyway. I mean, everything that happens here, aside from the form which the Court of Appeals wrote, has been decided by the legislature, and the legislature, in its continuing review of that, has decided that was one area where the statute and the procedures were inadequate and has provided for that information to come before the jury, and that particularly in its written form, it is—it is not that emotionally inflaming. We're not [74] allowing the victims to make a speech to a lynch mob or anything. We're providing information so they can have the entire picture.

And in this case, Your Honor, I think if ever there was a case for a victim impact being provided, it's this case, because remember what our facts are. This is a neighbor who has killed two older people and left them in their house for, as he undoubtedly would have to expect, for their family to find them, tied, and stabbed to death. When they left the first time and decided to come back, they left the first time. That decision was made. He and his associates didn't care who found them. They went back and took their girlfriend back and left a second time, and again they must have made the decision, just plain don't care who finds these people, how they find them.

Quite frankly, Barry Bronstein, the man who has come in here to testify, has a strong physical constitution it's a wonder that he didn't suffer a heart attack and die right there. That's what Mr. Booth set in motion. That's what he knew what he was

leaving. Let's not keep from the jury the ability to—to look at the entire picture.

For all the arguments about what should come before the jury and what shouldn't, the State's position is, let's get everything out that's true, because they have to decide the most important issue, and there really is no information [75] they shouldn't have. And on that we will submit.

THE COURT: The Court is guided by the prior decisions of the Court of Appeals, obviously, and the legislative intent. The legislature had a long hearing on the issue of permitting the victim impact statement. I believe the Roper committee was the committee that brought this issue before the legislature and acted as the catalyst that caused the legislature to ultimately pass the amendment to the statute, which was authorized by the presentation of the victim impact statements to the jury. The Court believes that the jury should be entitled, as the statute specifically designates, to any and all evidence which would bear on the issues that they have to decide, which is probably the most important issue they will ever be called upon to decide; that is, the question of life or death of Mr. Booth. Under those circumstances, the Court believes that the victim impact statement should be given to the jury, so that they can be aware of the impact of the crime on the victim of the crime. The jury will be aware of the impact, of the impact they intended to do to the victim, and the Court feels that the jury cannot act in a vacuum. The jury must have all the facts of the case. So the Court will deny the motion to bar the victim impact statement.

The State may present it either through oral evidence or through written form. The State has indicated they intend [76] to use the written report. The Court has no problem with that issue. The victim impact statement will be admissible in whatever form the State deems appropriate.

There's one final matter that the Court wants to address today, and that is the issue of whether or not Mr. Booth will be addressing the jury himself personally during the penalty

phase. I will pose that question to counsel, because if you wish to have Mr. Booth address the jury, I will have no objection to that. I think that if he wishes to argue to the jury, that along with defense counsel, that counsel indeed has a right to do that, and I will permit you to do that.

MR. BROWN: We don't have to make that decision today?

THE COURT: Well, if he intends to do that, I would like you to let me know, so that I can make arrangements for where he's going to be positioning himself and how much argument he's going to make. Mr. Doory?

MR. DOORY: Your Honor, I would ask—and there was a time that the statute seemed to indicate either the Defendant or his attorney could present argument. I think it's always been ludicrous for anybody to submit that the Defendant couldn't address the jury. I realize I don't have the right to cross examine somebody who is addressing the jury, but I ask this, please let me address the jury after the Defendant

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\* \* \*

[5] THE COURT: Very well. I'll overrule that objection. Is there anything then in the pre-sentence report or the victim impact statement that the defense objects to?

MS. SHEARER: As far as the victim impact statement, we would request that we have a continuing objection to its admission on the grounds that we delineated in our motion to suppress the victim impact statement and the motion to bar the victim impact statement.

Furthermore, we believe that the victim-impact statement is inflammatory and prejudicial. We believe certain parts should be struck. For example, I believe the first paragraph that indicates how the victim-impact statement was prepared and why it was prepared and when it was prepared is superfluous. I believe that is not necessary. It gets into the co-defendant.

Furthermore, I believe the third paragraph of the victim-impact statement has already been testified to during the trial and there is no need to have this reiterated.

Furthermore, in the last paragraph on [6] the first page, the last sentence, we would say that, the victims' son reports that his children first learned of their grandparents' death from the television reports, is very inflammatory and should not be admitted. The whole tone of the report is very inflammatory. We can try to deal with it as best we can.

We further go on to state on the second page of the victim impact statement in the middle of the second paragraph where it states, the victims' son feels that his parents were not killed, but were butchered like animals, is very inflammatory and should be deleted. On to the third page, we would indicate that we believe the second paragraph or the first full paragraph on that page in the middle, the paragraph where it starts the victims' daughter attended, is extremely inflammatory, especially where it states, the victims' daughter states that animals wouldn't do this. Furthermore, it goes on to say she does not feel that the people who did this could ever be rehabili-

tated and she doesn't want them to be able to do this again or put another family through this. Again, at the bottom of the last paragraph, it indicates that the victims' [7] granddaughter saw a counselor for several months, but stopped because she felt no one could help her, is inflammatory and prejudicial.

We would also totally object to the full second paragraph on page four. It deals with the victims' family's feelings over the delays in these trials. We think that is not a proper subject for this victim impact statement and as far as the last paragraph on page four, we believe the attendance of the funeral is inflammatory and should not be made a part of this. On the last part of the last paragraph where the writer of the victim impact statement interjects her feelings as to this, where she states it became increasingly apparent to the writer as she talked to the family members that the murder of Mr. and Mrs. Bronstein is still such a shocking, painful, and devastating memory to them, that it permeates every aspect of their daily lives. It is doubtful that they will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them. I don't think that's a proper sentence in that it indicates the writer's feelings in the victim impact statement and that [8] would be our objection to it, as well as our continuing objection to its admission by the state.

THE COURT: All right. Mr. Doory?

MR. DOORY: As to the victim impact statement, Your Honor, the first paragraph if the defense wishes, that can be deleted. The state has no objection to that. I don't see in any way, shape or form that it is harmful. Your Honor, I would indicate that they are accurate summations of the feelings of the victim's family and about how pervasive this tragedy is to their entire family.

Now during preliminary objections, defense counsel asked the court not to allow a victim impact statement to be permitted to the jury and that if you do allow it, please let it be in written form. The state was aware of what the victim impact



statement was at that time and indicated that we would present it in writing so as not to be more inflammatory than necessary. But, your honor, these are the facts. This is what the jury must know.

But, specifically, Your Honor, the defense has objected to the last paragraph as [9] being a conclusion of the writer. We will agree it is a conclusion of the writer. If in fact the defense wishes to press that objection, the state will then withdraw what we consider to be a magnanimous offer and we will present live testimony so that the jury can come to that absolute same conclusion. For there is no question that anyone who would talk to the family of the victims, to understand the impact of it, would realize that this is a tragedy, which will permeate their lives for the rest of their lives. With that, Your Honor, we turn it over to the defense. They objected to the last paragraph. We will withdraw our offer to proceed on a written form.

THE COURT: Anything further from the defense?

MS. SHEARER: Your Honor, in light of what Mr. Doory has said and I understand him to say if we press on the objection of the last few sentences of the paragraph, that he in turn will offer the testimony through live witnesses?

MR. DOORY: That's correct.

MS. SHEARER: With that, we would withdraw the objection—not withdraw, we would [10] not press on that objection.

THE COURT: Very well. The court has very carefully listened to all the arguments previously set forth with reference to the victim impact statement and the court will accordingly overrule the objections to the victim impact statement and the specific parts of that victim impact statement. The first paragraph is an introductory paragraph, which does not in any way impact on anyone other than simply telling what occurred and how the victim impact statement was prepared. The purpose of the victim impact statement is to let the ultimate decision-maker know what the impact of this situation was on

the victims and it would appear that the statement does not go beyond what the impact of this situation was on the family. So the objections will be overruled and the objection will be overruled. The victim-impact statement will be admitted in total as it has been prepared and presented.

The pre-sentence investigation will, of course, be presented. The court will overrule the objections the defense made to that statement. One of the objections to that statement as to

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**(ADMISSION OF VICTIM IMPACT STATEMENT INTO  
EVIDENCE)**

[52] MR. DOORY: It will be stipulated as a joint exhibit and we would ask that the original be marked or a copy.

THE COURT: Have the original marked.

MR. DOORY: Would you mark the pre-sentence investigation as—

THE COURT: Joint Exhibit Number 1.

MR. DOORY: And the victim impact statement.

THE COURT: Joint Exhibit Number 2. (Whereupon, the attorney for the state introduced into evidence Joint Exhibit Numbers 1 and 2.)

MR. DOORY: Your Honor, at this time we would ask the court's permission to read these documents to the jury?

THE COURT: Please.

MR. DOORY: Ladies and gentlemen of the jury, you will see them in a few minutes. I won't—

THE COURT: Mr. Doory, perhaps if you sit in the witness chair. You can hold the microphone and you could read it and then that way you don't have to stand.

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**(TESTIMONY OF JANE SPARROW)**

[81] I've given you as the instructions, there are some grammatical errors, which I hope you will forgive me. I will correct those when I meet with you after we let the jury go.

MR. BROWN: Thank you, Your Honor. The defense will call Mrs. Sparrow to the stand, please.

Whereupon,

JUNE SPARROW, a witness of lawful age, being first duly sworn in accordance with law, was examined and testified as follows:

THE CLERK: State your name and address please for the record.

THE WITNESS: My name is June Sparrow and I live 3416 Rockwood Avenue.

**DIRECT EXAMINATION**

By Mr. Brown:

Q: Now Mrs. Sparrow, what is the relationship between you and John Booth?

A: He is my son.

Q: Is that the same John Booth that's seated at the end of the trial table?

A: Yes, it is.

Q: Now Mrs. Sparrow, would you tell the [82] ladies and gentlemen of the jury when John Booth was born?

A: November the 19th, 1953.

Q: And what was John's father's name?

A: John Edward Booth, Sr.

Q: Now when were you and Mr. John Booth, Sr. married?

A: March of 1957.

Q: Now do you have other children?

A: Yes, I do.

Q: Would tell the ladies and gentlemen of the jury their names and ages, please?

A: John Booth, Jr. will be thirty-one next month. Janice will be thirty February the 3rd. Wanda is already twenty-seven. Patricia Booth is twenty-five. Sharon is twenty-four and Roslyn is twenty-two.

Q: Now do you have any other children?

A: Yes, I do, by another marriage. Timothy Sparrow.

Q: Now do you have any children that are not alive.

A: Yes. Marvin Booth, which was put in foster care and that's where he stayed. He died in foster care.

[83] Q: Now Mrs. Sparrow, I want to direct your attention back to approximately the year 1955 or so. Do you recall where you were living at that time?

A: In 1955, I was living at 2905 Brighton Street.

Q: And with whom were you living?

A: With my mother, Mrs. Sarah Bailey.

Q: And was Mr. Booth with you at that time?

A: No, he was not. He was in the Navy.

Q: Now did there come a time when you and Mr. Booth started living together?

A: Yes.

Q: And when was that?

A: Well, when he would come in on leave, we would see one another and then it ended up into a marriage in 1957.

Q: Now after you were married, did Mr. Booth work?

A: Yes, he did.

Q: And what kind of work did he do?

A: First, he worked with a rubber company that was called hold tights and then later, he got into the Baltimore City Fire Department.

Q: Now did there come a time when you and [84] Mr. Booth and the children or John at that time moved from Brighton Street?

A: Yes, we did.

Q: When was that?

A: Around about 1957.

Q: And where did you move to?

A: 2835 Spellman Road in Cherry Hill.

Q: And how old was John around that time?

A: John was old enough to go to school, maybe the kindergarten.

Q: Now did there come a time when you moved out of Cherry Hill?

A: Yes, we did.

Q: And when did you move out of Cherry Hill?

A: In 1959, in November.

Q: Now between 1957 and 1959, would you describe for the ladies and gentlemen of the jury, the family life of the Booth residence during that particular time?

A: Well, we were having like wars.

Q: Now you say you were having like wars. Who are you talking about when you say we?



A: My husband and I. John Booth, Sr. We would argue and fight most of the time.

[35] Q: In addition to arguing and fighting during that period of time, were there times when Mr. Booth or you or both of you were not in the home?

A. Yes.

Q. Would you describe that for the ladies and gentlemen of the jury?

A. At times, I would not know if we were going to eat or what we were going to do because Mr. Booth would not return into the home. So then later on, I took it upon myself to try to get revenge and then I would go, too.

Q. Now when you would go and when Mr. Booth would go, were the children attended to?

A. Most of the time the children were attended to by an aunt of mine, my grandmother and another aunt. But all three are deceased now.

Q. Now for what period of time would you leave the home?

A. Most likely it would be two days at a time and then later it got to be three and then four. No more than four days.

Q. What about Mr. Booth?

A. He was gone mostly all the time.

Q. Now did there come a time when you moved [86] out of Cherry Hill?

A. Yes.

Q. How did that come about?

A. We were purchasing a home and we thought maybe that we would end up being a much better family and we moved to 4220 Towanda Avenue.

Q. Now when you moved to Towanda Avenue, when was that?

A. That was November of 1959.

Q. All right. And after you moved or purchased the home on Towanda Avenue, did your marriage settle down there?

A. No. It flared up just as bad as it was in Cherry Hill.

Q. Now do you have any idea as to what caused it to flare up?

A. No, I don't.

Q. Do you know whether or not Mr. Booth, Sr. was drinking or anything?

A. Yes, he was.

Q. Now, how was life on Towanda Avenue?

A. It was nice. It was a nice home. I was trying to keep it together.

Q. And were you getting help from your husband at that time?

[87] A. No, I wasn't.

Q. Now during the time that you were living on Towanda Avenue, did Mr. Booth continue the kind of activities that he had been doing when you were living in Cherry Hill?

A. Yes, he was.

Q. And what, if anything, was your reaction to that?

A. I was leaving the home also.

Q. So that during that time, would it be fair to say that both you and Mr. Booth—

A. Right.

Q. —were out of the home?

A. Right.

Q. Would it be fair to say that you were out of the home for a substantial period of time?

A. Yes.

Q. Now how many children did you have at that time when you were on Towanda Avenue?

A. I had six—no, I had five. I'm sorry. Because Sharon was the baby.

Q. Now were there times when you were living on Towanda Avenue when both you and Mr. Booth were not at home that John had any responsibility or was left with the children?

[88] A. Yes, it has been.

Q. Can you describe for us the extent of the drinking, if any, that occurred in the household at the time?

Well, at times when I was home, different friends of mine would come pass and we would drink, but not no whole lot of drinkin sort of thing. But we would have some drinks.

Q. Now was John's father drinking heavily during the time you were on Towanda Avenue?

A. Yes, he was.

Q. Now generally, when he came into the house. Mr. Booth, Sr., what would happen?

A. Could you repeat that?

Q. During the time that Mr. Booth would come into the home on Towanda Avenue, what, if anything, would happen?

A. A lot of times we would get into arguments.

Q. Were there ever fights?

A. Yes, it was.

Q. Was it physical?

A. No, not at this home. The police was never called.

Q. Now can you describe for the ladies and [89] gentlemen the relationship that John enjoyed with his father during the time that you were living on Towanda Avenue?

A. John enjoyed his father because he was proud of him because he had a firefighter suit on.

Q. Did John ever do anything with regard to his father and the other children?

A. He would have his father talk about the fires and things to some of the other children and this made John very proud.

Q. Now did there come a time in 1961 or so when Mr. Booth left the house?

A. Yes. We had a foreclosure on the property.

Q. And approximately when was that?

A. Well, it takes three months, I think, for the foreclosure to go through. So he had left previous, before that, and I was left with the children without lights, without water and we would have to leave early enough in the morning to go to Piedmont Avenue to an aunt of mine.

Q. And do you know how John's father's leaving the home affected John?

A. No, I don't.

Q. Okay. Now did there come a time when [90] you left Towanda Avenue?

A. Well, we moved from Towanda Avenue and went back to 2905 Brighton Street.

Q. And with whom were you living at this time?

A. At the time, I was living with my mother.

Q. All right. Now during the time you went back to Brighton Street and was living with your mother, did you have occasion to see Mr. Booth, Sr.?

A. Yes, we did. We tried to make up again and in the meantime, we had another child, which is Roslyn.

Q. When you tried to make up, make a go of it, what, if anything, occurred at that point?

A. No. It didn't materialize because later he left and went to work for E. J. Korvettes in New York City.

Q. Now was there still the fighting and drinking?

A. Yes, it was.

Q. At that point, too?

A. Yes, it was.

Q. Now did there come a time when you left [91] Brighton Street after you lost the home on Towanda Avenue?

A. Yes. We left and we moved, if I'm not mistaken, to 2227 Linden Avenue.

Q. And how would you describe the situation there, the family life on Linden Avenue?

A. The family life was pretty good for a while, but my family really got on me because I was on the third floor with all these small little children and it wasn't rails around the third floor and then my mother asked me to come back to Brighton Street.

Q. Okay. Now before you went back to Brighton Street, while you were on Linden Avenue, was your pattern of drinking still the same?

A. My pattern of drinking had increased.

Q. I think you indicated earlier that people would come to the house?

A. Right.

Q. Did this continue?

A. Right.

Q. Now when you moved back from Linden Avenue to Brighton Street, who all moved with you?

A. All of my children moved with me.

Q. Now, when you moved back, when you moved [92] from Linden Avenue back to Brighton Street with your mother—

A. Right.

Q. —There were occasions when Mr. Booth would come there?

A. Yes, he did.

Q. And how often would you say he came?

A. Well, he would come sometimes maybe like on a weekend, which I didn't know a lot of times. He was there and John would see him and he would be hiding.

Q. Now you said he would be hiding. Who would be hiding?

A. Mr. Booth, Sr. would be hiding in the basement.

Q. And how did you discover that he was hiding in the basement?

A. Because at that time, the welfare was giving out food and John would feed his father.

Q. Now up to that point, you didn't know that he was in the basement?

A. No, I did not.

Q. All right. Now after this was discovered, was there any problems with regard to you and Mr. Booth, Sr.?

[93] A. Yes. Because then he would come around and come through the front door and this is when we would begin to fight.

Q. Now during the time that you were on Brighton Street, how many times would you say that occurred?

A. When I was on Brighton Street?



Q. Yes.

A. This happened about twice.

Q. Now did there come a time when as a result of any of these fights, Mr. Booth, Sr. was arrested or taken from the house?

A. Only one time. The officer came on Brighton Street and told him to leave the premises.

Q. Was John around when this occurred?

A. Yes, he was.

Q. Do you know what, if any, effect that had on John?

A. No, I don't.

Q. Now did there come a time when you moved from Brighton Street?

A. Yes.

Q. Where did you move then?

A. I think at that time I moved on Pratt [94] Street.

Q. Do you recall what year that was?

A. That had to be between 1962 and 1963.

Q. Did Mr. Booth, Sr. appear on the scene at that time?

A. Yes, he did.

Q. What, if anything, occurred?

A. We used to fight quite a lot.

Q. Now did there come a time during that period around 1962 or 1963 when you became involved with someone other than Mr. Booth?

A. Yes, I was. I had another son born out of wedlock.

Q. And who was the individual that you were seeing at that time?

A. Mr. Herbert Sye.

Q. Now was there anyone else around that time that you were involved with?

A. Yes. A Mr. Wendell Sparrow, who I am married to now.

Q. Now did there come a time during this period when you would again go off and leave the children?

A. Yes.

Q. And how often did that occur?

[95] A. Well, that would happen mostly on the weekend.

Q. And for what period of time would you be gone?

A. Two to three days.

Q. Now directing your attention then to around 1984, did there come a time when your children were taken from you?

A. Yes.

Q. And were you at home when the children were taken from you?

A. No, I was not.

Q. Now who took the children?

A. The Department of Social Services—well, at that time it was called the department of welfare.

Q. How many children did they take?

A. They took five.

Q. Five of them. And do you recall where you were at the time when The Department of Social Services took the children?

A. Yes. At that time I was looking for employment because the moneys that they gave me was not enough for me to buy oil and to have hot water.

[96] Q. Where were you looking for employment?

A. At what they call Camp Louie's.

Q. Where is that?

A. Right now I have forgotten where that is.

Q. Do you recall whether or not it was in the city?

A. No. It's kind of outskirts.

Q. How long had you been gone?

A. For two days.

Q. Now when you realized that Social Services or The Department of Welfare had taken the children, did you make any efforts to get them back?

A. Yes, I did.

Q. What did you do?

A. I went down to Pine Street and then they explained to me that they were taken to the Department of Social Services.

Q. How long were the children taken away from you?

A. Almost two years.

Q. How long had the children been taken away from you before you started seeing them?

A. I'll say about six months.

[97] Q. About six months. Now after the children were taken from you and you realized that they had been taken, did you in any way change your activities?

A. Yes, I did.

Q. What did you do?

A. Well, I looked for another place. I had to talk with another couple of social workers and then they put me on G.P.A. to work. It's the General Employer—whatever it is. I just don't recall.

Q. Now you did start seeing the children; is that right?

A. Yes, I did.

Q. Now did there come a time when John came home from the first foster home?

A. No, he did not. He was taken out of the first foster home because by the time I got a chance to go to visit John at the first foster home, he was removed.

Q. Do you know why he was removed?

A. Yes. I later found out that in the foster home, they would tie him up and the other children would throw feces on him.

Q. Now do you recall when it was that you [98] actually got John and the other children back into your care?

A. I had to go for a hearing in the building with Mr. O'Grady and at the time the case was rescinded because they found out that I wasn't lying, that I was looking for employment and the children were supposed to be returned immediately, but they would only send one at a time, one maybe seven months later and it added up to two years.

Q. How long were they gone from you?

A. About two years.

Q. About two years. Now after you got them back, would it be fair to say that you started getting your life in order?

A. My life was really in order.

Q. Could you describe for the ladies and gentlemen of the jury as John was growing up, how he related with other children?

A. Well, when we first were living in Cherry Hill, John was very, very timid and I know he doesn't like me to say this, but I used to put on him his oldest sister's dress and bonnet, socks and shoes, and send him outside because he was very timid and he let other people beat and bang on him. I actually got tired. I told him only [99] little sissies act like that.

Q. How often did this happen?

A. This happened like three or four times.

Q. And would you during this period of time when he was outside, would you hear him trying to get in?

A. Yes. He would bang on the door and holler mommy, let me in.

Q. And did you let him in?

A. No. I would let him stay out there. That was my way of punishing him.

Q. Now you understand, do you not, that the state is asking the jury to return a sentence of death—

A. Yes.

Q. —for John. If in fact it did that, how do you feel that would affect you and the other members of your family?

A. Well, it would affect me very much because first of all, none of us really know who actually did anything and then you might be condemning the wrong person.

Q. Now is there anything that you wish to add or say to the ladies and gentlemen of the jury with regard to the possible penalty they may be [100] imposing on your son?

A. Yes. I feel as though God has given me a second chance and I feel as though my son should also have a second chance because only God gives the revenge.

Q. Now do you recall, Mrs. Sparrow, when it was that John returned to you, what year he was returned to you from the foster home? Do you recall how old he was?

A. He was between ten and a half and eleven or maybe twelve years old because at this time I had carried him to Sinai and had his tonsils removed and also I had him circumcised and I'll never forget it. He set on the bed and said to me, mommy, you really did me up this time.

Q. Would you answer counsel's questions?

A. Yes, I will.

# CROSS-EXAMINATION

BY MR. DOORY:

Q. MRS. SPARROW—

A. Yes.

Q. —I wish I didn't have to ask you any questions, but—

A. It's all right.

Q. —under the circumstances, I do.

[101] A. That's perfectly all right.

Q. When you say your children were taken away from you, that was John—

A. That was John, Janice, Wanda, Patricia.

Q. Sharon?

A. No. Sharon was with her godmother. Roslyn and Marvin died while he was in foster care.

Q. And you said that it took two years to get them all back?

A. Just about two years.

Q. Who was the first one?

A. John came home first.

Q. How long was he gone from you?

A. That was about two—

Q. I thought it was seven months for that?

A. Maybe about seven months.

Q. So he was gone for about seven months total?

A. Yes, or maybe a little more.



Q. Janice is thirty years old now?

A. No. Janice will be thirty February the 3rd.

Q. Has Janice ever been in prison?

A. Not as I know of.

[102] Q. What about Wanda, who will be twenty-seven, has she ever been in prison?

A. Not as I know of.

Q. Patricia, who is twenty-five, has she ever gone to prison?

A. No.

Q. Sharon, who is twenty-four, has she gone to prison?

A. No.

Q. Roslyn, who is twenty, has she ever gone to prison?

A. No.

Q. I don't mean to embarrass you.

A. That's all right.

Q. You have testified for John before in his other problems, have you not?

A. Yes. Um-hum.

MR. DOORY: I don't think we'll go any further. Thank you.

THE COURT: Anything else from the defense?

MR. BROWN: Yes, your Honor.

#### REDIRECT EXAMINATION

BY MR. BROWN:

Q. Mrs. Sparrow, do you remember the first [103] time when both you and your husband were not in the home, if you will?

A. Yes.

Q. Do you know whether or not John carried the responsibility for seeing after the children?

MR. DOORY: Objection to that, your Honor.

THE COURT: Are you recalling Mrs. Sparrow as your witness?

MR. BROWN: I'll remove it, your Honor.

THE COURT: I'll permit you to ask any questions you want to.

MR. BROWN: I'll withdraw it.

THE WITNESS: I will answer it because he did.

THE COURT: Mrs. Sparrow, the question has been withdrawn. Please only respond when there is a question.

THE WITNESS: I understand.

MR. BROWN: I have no other questions.

THE COURT: All right. May Mrs. Sparrow be excused?

MR. BROWN: Yes, your Honor.

THE COURT: You may step down. You may sit in the courtroom if you like, if you want to.

[104] THE WITNESS: I'll sit in the courtroom with my other son.

MR. BROWN: Your Honor, do you want us to put on a new witness or do you want to break for lunch at this time?

THE COURT: Let's break at this time.

Ladies and gentlemen, it's 12:29. It is close enough to 12:30. We'll take our lunch break at this time. Please do not discuss the case with any other person or don't let anyone attempt to discuss it with you. I want to thank you, members of the jury, for coming back and reporting that information to me on the 4th of October. I would like to see you back in the jury room at

quarter to two. Everyone remain seated while the jurors leave the courtroom.

(Whereupon, the jury was excused from the courtroom, after which the following proceedings were had:)

THE COURT: Counsel, you are excused. I'm going to take Ms. Ehrlich, and we'll start at quarter to two.

(Whereupon, after disposing of an unrelated matter, the court recessed for lunch, following which the proceedings in this matter [105] resumed.)

#### AFTERNOON SESSION

(Whereupon, the defendant was brought into the courtroom.)

MR. DOORY: Your Honor, now that the defendant is here on the record could the Court please explain for the record what we interpreted a very cryptic remark, thanks for the information they provided on the 4th of this month.

THE COURT: You have me lost, Mr. Doory.

MR. DOORY: Just before the jury left, I believe it was after admonishment, you said something about thank you for the information that you provided the court. I thought you said on October the 4th.

MR. CROWE: About an incident or event.

THE COURT: This was after I had released the jury and admonished them not to discuss the matter with any other person. Two of the jurors were approached by a member of the media, who were not aware of the fact that the jury was still of a continuing nature. Inconsequently, they had advised me that they had been approached and said nothing. I have spoken to that member of the media. He was not aware the

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#### (TESTIMONY OF SARAH BAILEY)

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[107] THE CLERK: State your name and address for the record, please.

THE WITNESS: Sarah Elizabeth Bailey.

THE CLERK: What is your address?

THE WITNESS: 3416 Rockwood Avenue.

#### DIRECT EXAMINATION

BY MR. BROWN:

Q. And Ms. Bailey, what is your relationship to John Booth?

A. His grandmother.

Q. And do you see John Booth here today?

A. Yes, I do.

Q. Would you point him out please?

Mr. Brown: Indicating for the record the defendant seated at trial table.

Q. Now Ms. Bailey, I notice that you have an artificial arm and I would like to ask you when and how did you lose your arm?

A. I lost my arm due to a gunshot wound.

Q. And when was that, ma'am?

A. August—I can't remember the year, but I was forty years old—in '72.

Q. Now after you lost your arm, what was your mood around that time?

A. Well, I wouldn't accept it. I couldn't [108] accept an artificial arm. It was too heavy. It was too everything. I'd just

sit at the window and just look out the window. I wouldn't go out. I wouldn't go to the store. I wouldn't go to church.

Q. Now you are going to have to keep your voice up so the ladies and gentlemen of the jury can hear you.

A. I will.

Q. Now do I understand you to say that you couldn't accept the loss of your arm; is that right?

A. It was that my artificial arm was too heavy. It just didn't feel right. It was too heavy.

Q. Now did you carry on any other kind of activities initially?

A. Well, I did without that for about two years, just sitting in the house and wouldn't go, wouldn't do anything until John was born.

Q. He was born. Now what effect did John's birth and John have on you and the problems that you were experiencing?

A. I feel like he really healed me.

[109] Q. Would you explain that for us, please?

A. Because when nobody was there, my daughter be working or whatnot, I would put on this heavy artificial arm and lock it and sit him up here (indicating) and hold my hand to his back and carried him up and down the steps.

Q. All right. Now as a result of that, what occurred to you and what happened with you?

A. Then it made me feel like I would try to use the artificial arm.

Q. And that was as a result of John's birth and his being there with you?

A. Yes, it was.

Q. And did you begin to use the arm more?

A. I began to use it after I found out that it maybe wasn't too heavy after all because I thought that I was nothing, I was no more good, I wouldn't be able to do nothing.

Q. Now after you started using it, did you then come out of the shell that you were in or what?

A. Eventually. I come out slowly, but I come out.

Q. Now when you came out, what did you do?

A. Well now, I came out my shell. I went [110] to the store and I started looking for a job. It was like a voice in my ear that said you might as well go back home. People with two arms couldn't find a job. That was what the devil was telling me and I would drop the tears and still try.

Q. And did you eventually go to work?

A. I eventually got a job. I went to church on Sunday and the people was feeling sorry for me. It gave me a headache and I came home and laid across the bed and said, June, tomorrow call Gordon's. She said Gordon who? I said Gordon's Cleaners. I guess all I heard was Gordon's and I worked for Gordon's Cleaners seven years.

Q. And then did you work anyplace else after that?

A. After Gordon's, I got held up three times and the third time a knife was stuck in my rib and I didn't know it until officer Kavanaugh from the Eastern District was there and carried me up to Hopkins, up the hill and they gave me a sedative and looked at that place in my side and then he told me that I shouldn't work in a place like that. I should work at Goodwill because they hire handicapped people.

Q. And did you eventually go to work at [111] Goodwill?

A. I did.

Q. And did there come a time when you stopped working at Goodwill?



A. When I stopped working at Goodwill, my counselor there found out that I was a Family and Children's Associate Mother. When the mother had to go to the hospital or whatever, they called me in the home to take care of the children. But after I lost my arm, I couldn't do that job anymore because sometimes it was babies and at that time my husband was drinking heavy so that wouldn't do either. So I didn't do that.

Q. Now did there come a time when you gained employment with Rosewood?

A. After they found out that I had been a housemother, the counselor carried me to 301 Preston Street and they gave me the aptitude test and examined me and gave me a letter and sent me to Rosewood.

Q. All right. And how long did you work at Rosewood?

A. It was after about sixteen years, seventeen years. But I stopped at 66.

Q. And how do you feel about John's [112] contribution to your having worked all those years?

A. I owe it all to him because if that child wasn't born in the world, I would be out Crownsville or Spring Grove because I would just sit and pine away because I wouldn't even talk to my friends. They called and I wouldn't talk to them. I just felt like I was no more good. What really is some of it, I got on the street car and a white lady got up to give me a seat. That did it. When they offered me a seat, I knew I was done with that. I was no more good. That upset me terribly.

Q. And as a result of John's birth and you having to do for John, you eventually got out of your shell,

A. I came out of my shell when I found out that I could do something.

Q. Now you understand, do you not, that the state is seeking to impose the death penalty on John, do you understand that?

A. Yes, I do.

Q. Is there anything that you wish to say to the ladies and gentlemen of the jury on John's behalf at this time?

[113] A. The only thing I can say is he saved my life and the man that shot me was a Deacon's son in church and my aunt Ruth, she was minister. He is dead now. She wanted me to have him locked up. That wouldn't have brought my arm back and the result was he had a heart attack. He drove a truck and he ran into a train and he had a heart attack. That's why he didn't hear the train and he had a heart attack and he passed away because he had worried about what he had done. I believe and God knows I believe to have to live with something the rest of your days is better than flash (indicating) because it does more harm when you got to live with something. I lived two years in a shell because something was wrong with me, I thought. To live with something, to know that you intend to harm somebody, whether by gas chamber, death penalty is just like this. But to sit and live with it, it's worse. I know because I lived with it for two years. If John hadn't been born, I would have been in Spring Grove or Crownsville.

Q. Now, Mr. Bailey, in the event the jury should sentence John to die in the gas chamber, how do you feel that would affect you?

A. I would have a heart attack and die [114] because I have been having pains in my heart ever since Janice told me. I don't think I would live a month. I have been going upstairs and laying down because I have pains in my heart. I'm sorry.

(Whereupon, the witness became emotional.)

A. I'm sorry for everything. I'm just sorry. But I don't think I would live a month because it's giving me pains in my heart because I love the boy and he helped me to live. He helped me to be able to draw pictures and live on Rockwood Avenue. If it hadn't been for him, I would be out in Spring Grove or Crownsville because I couldn't accept myself and he motivated me.

MR. DOORY: Ms. Bailey, answer the questions of the State's Attorney.

THE WITNESS: Yes.

THE COURT: Would you like to take a break?

THE WITNESS: No, I'm all right.

THE COURT: Would you like a drink of water or something?

THE WITNESS: Yes.

#### CROSS-EXAMINATION

[115] BY MR. DOORY:

Q. Ms. Bailey, I just have a few questions, Okay?

A. All right.

Q. You obviously strike us all as being a very religious woman.

A. I believe in God.

Q. And how long have you been religious?

A. Ever since I was about eighteen years old.

Q. So that the whole time that John has been alive and the whole time that your daughter, June, was alive—

A. I've been religious. I have been in church. The man that shot me was from the same church I belonged to, Gillis Memorial.

Q. And your daughter, June Sparrow—

A. That's my daughter.

Q. —she is also a religious woman; is she not?

A. Yes, she goes to church now.

Q. Now you told us about basically your whole life since John was born. You have been working virtually ever since that; is that correct?

[116] A. After he was born, right. He motivated me to use an artificial arm.

Q. I believe that Mrs. Sparrow has let us know that off and on, John and his mother and his sisters have lived with you; is that correct?

A. Yes.

Q. And in fact on Rockwood Avenue they have lived with you. Is that your home?

A. Yes.

Q. So is it fair to say that since the time John was born, you've always had a home that he could come to?

A. I always did when he was born in my home—

Q. And there has always—

A. —on Brighton Street.

Q. On Brighton Street and then Rockwood. But there has always been a home for John?

A. Always a place for John. Yes, I always had a home. From the time I started to work with Gordon's and Goodwill, that was my home on Brighton Street, where he was born, 2905 Brighton Street.

Q. I really don't mean to argue with you—

A. No.

Q. —but when you say that John motivated [117] you—

A. He did because without him, I wouldn't put it on. It stayed upstairs on the chair.

Q. Mr. Bailey, isn't it really your love for him that motivated you?

A. Yes, sir. I loved that little boy. I used to carry him to New York and all over the place with me with the nipple and bottle because he seemed like he was mine because I had taken care of him when he was born and in fact once he had diarrhea in January and he was an infant then because he was born in November and I wrapped him up, put his sweater on and took him to Dr. Woodland in a cab. John meant a lot to me and another time when I go to bathe him, my nephew would stand up to the tub and tears would run down his eyes for fear because of the artificial arm. John, it seemed like he would hold up his arms, he would hold up his little legs and let me clean him and wash him. I would have a pad on the dining room table and that's the way I used to care for him. I had an artificial arm on and I wouldn't dare bring him up and down the stairs without it.

Q. And no matter what you still love John?

A. I still love John. I'm sorry but I love [118] him. I can't help from loving him because if it wasn't for his birth, I would be sitting home.

Q. I'm not going to ask you to stop loving him.

A. I would be sitting home getting retirement checks from the state.

Q. During his other problems with the law, you have come to court and testified before, haven't you?

A. Yes, I have.

MR. DOORY: Thank you, Ms. Bailey. I have nothing further.

THE COURT: Anything else from the defense?

MR. BROWN: Nothing else, your honor.

THE COURT: Ms. Bailey you may step down. You can have a seat in the courtroom. You can watch whatever goes on.

\* \* \* \*

(TESTIMONY OF FATHER THOMAS SCHINDLER

\* \* \* \*

[138] DIRECT EXAMINATION

BY MS. SHEARER:

Q. Father Schindler, what undergraduate degrees do you hold?

A. I have a bachelor's degree in philosophy from St. Mary's in Baltimore and a bachelor's degree in theology from St. John's in Michigan.

Q. What graduate degrees do you hold?

A. I have a master's degree in theology. I have a doctorate degree in religious social ethics from the University of Chicago.

Q. Father, when were you ordained?

A. I was ordained in 1968.

Q. What position do you currently hold?

A. I'm a faculty member of St. Mary's Seminary here in Baltimore. I'm an associate professor. I teach Christian Ethics.

Q. What other positions have you held?

A. I have taught Christian Ethics for two years at the Seminary at St. Francis Academy. I have taught Ethics for two summers in Grand Rapids, Michigan.

Q. Are you a member of any professional [139] organizations?

A. I'm a member of the Society of Christian Ethics.

Q. Are you a member of any commissions?

A. I'm a member of the justice of the peace commission of the Archdiocese of Baltimore. I do work with the Bishops of Baltimore in an advisory capacity and I also have done some writing in the area of ethical issues of the commission.



Q. Do you hold any other positions in our community?

A. I am on the draft board out in the Roland Park area.

Q. Have you published any articles or pamphlets?

A. Yes, I have published a number of short articles and I have published pamphlets. One is On War and the Roman Catholic Conscience. It seeks to understand how conscienceness deals with war. Another is on War Tax Resistance, knowing how conscienceness deals with the issue of taxation, and one on The Church and Politics and What the Relationship is Between Those Two.

Q. Father Schindler, what is Ethics?

A. Ethics is basically an attempt to try to [140] explain a fundamental experience that we all have as a human being. We all make decisions of right and wrong in the course of our lifetime. But what the study of ethics tries to do is make that explicit, to try to understand explicitly how we go about that, what the process is as well as what the criterion is of right and wrong.

Q. Father, does ethical reasoning apply in this situation here?

A. Yes. I believe that ethical reasoning comes very much into play here because really what ethics is trying to do, as I said, is to understand the difference between right and wrong, what the fundamental basis is of determining what is right and what is wrong, what lifts up or supports our human dignity, and what it is that tears down our human dignity. If it's something supportive or constructive, then it is right and if it's something that is destructive, then it is wrong. We're dealing with a question of the killing of another person. Then absolutely, we have got an ethical issue. We are talking about destroying a human being. So we're talking about murder. We are talking about an ethical issue. We are talking about imposition of the death [141] penalty and likewise—

MR. DOORY: Objection, your Honor. I don't believe that this is responsive. I believe it's outside the scope of the original guidelines.

THE COURT: I want to hear what he says.

MR. DOORY: Well, might we have a specific question so that you know whether or not that's a proper area to go into.

THE COURT: What was the last question?

MR. DOORY: I believe it was what is ethics and how does it apply to us.

THE COURT: I understand where you are coming from and I'll permit the Father to finish his answer.

A. As I was saying—

THE COURT: Excuse me, Father. Just keep in mind the restrictions under which you are testifying. You may not discuss the situation as we talked about this morning. Only discuss it as it applies to this case.

THE WITNESS: Right.

A. What I was saying was that insofar as we're talking about ethics, we're talking about what is right and wrong. As I said, we're talking about murder. We're talking about an ethical [142] issue. Also, what I was going to say is that insofar as we are talking about the imposition of penalties on Mr. Booth, a penalty such as the imposition of capital punishment, then likewise that is an ethical issue, which has to bring to bear ethical principles in terms of making a decision like that.

Q. Father, are there different ethical systems or ways of reasoning ethically?

A. When we attempt to make moral decisions, there are really two fundamental bases that we operate out of, a philosophical approach, which is more sound, more highfalutin than it is. What we're looking at is our ability to reason, the power of our reason, to take a criterion and apply it to a particular

situation, to take an understanding of what is right and wrong and to make application to a particular situation.

In addition to the philosophical human reasoning, the other way we can go about making moral decisions is by way of religious background, to understand what our faith tells us, what our particular faith commitments are, and then on the basis of those, go and determine a particular situation, what we should do and what we should [143] not do, what is right and what is wrong.

Q. Father, did you meet with John Booth.

A. Yes, I did. I had a conversation with Mr. Booth.

Q. And did you review his Pre-sentence Investigation Report?

A. Yes, I reviewed that.

Q. And did you review his Department of Social Services Record?

A. Yes, I did.

Q. Did you also receive information from Mr. Brown as to John's background and the type of crime?

A. Yes, I did.

Q. Did you find all of that sufficient to form an opinion, Father?

A. Yes. There was a solid basis there for looking at the morality that was involved in the situation.

Q. Furthermore, Father, have you been present in the courtroom during this second phase to hear all testimony in court?

A. Yes, I have.

Q. And have you heard The Victim-Impact Statement as it was read to the jury?

[144] A. Yes, I have.

MS. SHEARER: At this point, your Honor, I would offer Father Schindler as an expert in Social Ethics.

THE COURT: Well, do you wish to cross-examine?

MR. DOORY: No, your Honor. We went into that prior and with the court's limiting guidelines, the State has no objection to Father Schindler's expertise in those areas.

THE COURT: With the limits that we've already discussed, the court will permit Father Schindler to testify as an expert on Social Ethics.

Q. (By Ms. Shearer) Father Schindler, in looking at this ethical decision that is present here and looking at John's character, what factors did you find significant in John?

MR. DOORY: Excuse me for interrupting, but can the term ethical decision as formed in that question be defined?

THE COURT: I'm going to overrule your objection. I think anything you want to bring up, you will be able to bring up on cross-examination.

MR. DOORY: Your Honor, I think unless [145] it's defined, then it is a total violation of the guidelines that the Court set up this morning.

THE COURT: I'm listening very carefully, Mr. Doory. Go ahead. You can answer the question.

A. Could you repeat the question, again?

Q. (By Ms. Shearer) Father, in looking at the ethical decision that is involved here and—

MR. CROWE: Your Honor, I would objection.

MR. DOORY: Objection, your Honor.

THE COURT: One at a time.

MS. SHEARER: Let me rephrase the question.



THE COURT: Ms. Shearer, I suspect that the hang-up right now is the ethical decision which you are referring to may not be the same ethical decision that is involved. Now if you want to revise your question, feel free to do so.

MS. SHEARER: Fine, your Honor.

Q. (By Ms. Shearer) looking at it very simply, Father, what factors did you find significant in forming your opinion about John?

A. When you are trying to make any moral decision, which you will really try to do is to [146] look at a particular person and to try to understand the factors that are bearing upon this person or have an impact upon this person, in terms of the way that they are going about understanding morality and if you are talking about the factors in John's particular case, the issues that most struck me as particularly significant were three. One was first of all his age. Secondly, his social status and third, his moral capacity, his ability to reach moral decisions.

Q. What do you feel is significant about John's age?

A. Well, what I find significant about John's age is this, that in making a determination about a death penalty, really all, what I believe must be concerned about in terms of an ethical decision, is to understand that first, from an ethical position, there's always a bias toward life. It's a fundamental bias which means that basically there's a prejudice where our fundamental mode runs toward life itself. Now, it doesn't mean that life can never be taken and unfortunately, from an ethical point of view, at times this must happen. But always in making such [147] a determination, what we have to do is to understand that the bias runs toward preserving life and if life is going to be taken, it has to always be a last resort. That if there are other possibilities that can be considered rather than taking life, then those should be resorted to and in John's case, it seems to me that we are talking about a man who statistically has led less than half of his life and what we're talking—

MR. DOORY: Excuse me, your Honor. I have to object and I have to ask the Court a question, something that comes to me that we have to discuss at the bench.

THE COURT: Approach the bench.

(Whereupon, counsel and the defendant approached the bench and the following conference ensues:)

MR. DOORY: Your Honor, this appears to me and the State contends that the door has just been opened to cross-examine Father Schindler about the defendant's other murder. The Father is now talking about the death penalty as a last resort and what you should consider before going into that.

\* \* \* \*

[151] We do not want them to stumble into it. That's why I came up. I thought they were getting very dangerously close.

MS. SHEARER: My position is I don't think we have come close to opening the door at this point.

THE COURT: And let's hope we don't get there.

(Whereupon, counsel and the defendant returned to the trial table and proceedings resumed in open court.)

Q. (By Ms. Shearer) Father, let us move ahead to the second factor that you talked about which was social status, I believe. What did you find significant about that?

A. Okay. The impact that I found in terms of social status really comes, I believe, in terms of—maybe it would be good if I did two and three together and brought them together as a way of getting at this. I believe that insofar as we are talking about a person and what they do, what we start to talk about is morality. We also have to take into account responsibility and levels of responsibility because what we find after this experience is that when somebody does something, [152] we really not only assess what's done, but their moral responsibility for doing it. If somebody does something that they are relatively unaware of, that's very different than somebody who does something



that they are very much aware of. We are assessing not only what's done, but how it is done, the moral capacity of the person that is doing it.

Now in terms of trying to understand moral capacity what we have to understand, I believe, is a little bit about the development of a person ethically. How do we come to an ethical sense? But I believe that we are not born with an ethical sense. You are not born with a conscience. We are born with a capacity to make moral decisions. We are born with the capacity for a conscience and the way that this develops is the way that our conscience, our moral sensibilities, precisely, is brought out, our inner actions, because in order to begin to form a conscience, in order to begin to have the capacity to make moral judgments, what is needed is that we get a sense of rules, what is right and what is wrong from when we are young. But even more than the rules of what is right and what is wrong, we [153] get a sense of feeling for the values that are significant especially as they relate to human dignity. But over and above those, in addition to those, what I think we have to look at is not only the fact that a person needs these rules and a sense of values from his or her environment, but a person has to internalize them. A person has to pinpoint where they are, not just out there somewhere, removed from a person. But they really get internalized, a part of himself or herself, and the way that happens is that a person needs a stable environment and a loving environment. Because unless there is stability, then the acts of this person, to make these his or her own and to really understand what they are about, they can't be seriously qualified. In addition, there's the necessity of having a sense of a person being loved. Because if a person doesn't have a sense of being loved, then really the idea of making these rules one's own and feeling comfortable with them becomes very, very difficult simply because a person doesn't have a sense of who he or she is or a sense of goodness about themselves, a deep enough sense in order to live these out. So as far Mr. Booth goes then, the [154] question that I have to consider is was the situation in which he was brought up of such a nature as to be

supportive and promoting atmosphere in which these values, these laws, can be internalized so that he will be able to develop maturely or set a foundation for a mature sense of values. We are never sure how any individual responds to their environment and we receive things differently and we just really are not clear. It seems to me that in order to understand how a person does receive these rules or how a person's moral development does occur in relationship to their environment, we would have to determine what things were like for them when they were young. But what is the payoff when we look in later life? How did this develop? Did this person have the foundation set to really develop in a mature moral capacity?

Now to me what is mature moral capacity is in other words an adult conscience, the ability to make an adult conscience. What it really demands is two things. One is that a person have a really deep sense of who they are so that they don't have to live by moral rules, moral regulations. But really it's who they are that [155] comes across and likewise, what a person has to be able to do is to really broaden their outlook toward other things, other people, to a broader world. As we move from childhood to adulthood, in order that we mature morally, ethically, we are able to take into account broader words and broader needs. It's not just our own world. It seems to me that this becomes problematic, at least as I see it, in John's maturity because while John can mature as a child can mature in calendar years, go from two to thirty, that moral capacity, that ability to make moral decisions, does not necessarily mature in the same way and it seems to me that questions can be asked about the level of moral maturity that John has.

Now, I think that given that—that's just from a philosophical point of view—I think, likewise, we can look at it as a religious point of view and I think what we really have to understand, from a religious point of view, it that in looking at anyone, we have to take a christian approach to things. In other words, try to understand from a faith commitment as a christian what has always been underscored is that in order to have full justice, it

is always [156] necessary that justice be tempered by or shot through with love and mercy. There has always been a sense that if justice is done, the danger is that it will be applied in somewhat of a cold way, not looking at the individual, but just looking at rules, just looking at the situation and simply applying a period. What they do is ask of us or demand of us that we take into account this particular person and this particular situation in terms of trying to make justice, to make a judgment. So one factor, at least, that I would consider in terms of trying to take into account the ethical situations involved here with regard to John is to look at his moral capacity of where it is at, but also from a christian point of view, from a religious point of view, you need to bring that in.

At this point, I would also bring in the factor—

Q. Father, if I could direct you back to moral capacities. From your conversation with John and your familiarity with the Pre-Sentence Investigation Report, what factors in John's early life do you think influenced the development of his moral capacity?

[157] A. Well, I think at least from my perspective, what would have had an effect, a negative effect, would have been the lack of a stable home.

Q. Does the possibility of having a really powerful, negative influence affect a person's moral development?

A. I believe that would be the thing that really stands out.

Q. When you talk about moral capacity, are you talking about what is commonly referred to as conscience?

A. I'm talking about conscience. The reason that I don't use that word is because I believe what we tend to do is think of conscience as a single thing and we have it right through to adulthood. But I believe what we're really able to understand is that we don't have a single type of conscience throughout our lifetime, that our conscience really changes and becomes a rather different entity. When we are a child, the way that we

understand morality is in terms of rules, this is right and that is wrong. We understand it in terms of a kind of self-preservation, that I do right in order to save my skin basically, and I [158] avoid doing wrong because I don't want to lose my skin. When we get into adolescence, as we move out of childhood and into our teen years, the initial development, we begin to move away from single laws and away from the family and begin to look at a peer group. We are considering our peers as the type of people we live with. We absorb their values. But we don't want to be put out at this point. You get a broad thinking of things. Things are considered more broadly than they were when you were a child because it's not just saving myself now, but I'm looking to the group that I'm with, as a member, which I feel I have to be a part of. When we get into adult, that is what I was talking about having a matured moral capacity. We are stable. It looks more deeply into ourself. We have a sense of who we are, a sense of where we stand in as well as an attempt to reach out very broadly to our world and give things to people, do things for people, have a much broader social sense. So I am talking about conscience, but I'm not talking about a single entity that we have throughout our life.

Q. From your interviews with John and your talk with us, were you able to form an opinion as [159] to what John's moral capacity was?

A. Well, I think the thing that most struck me as I talked with John was that John understands theoretically moral norms. He knows the Golden rule, do unto others as you would have them do unto you. But what also became clear to me was that when it came down to practical things, down to how you do things in particular situations, how you make decisions about what is right and wrong, what came across to me was that John really basically makes decisions much as a child would. That it is a question of how do I preserve my space, preserve myself and that really becomes the primary factor in terms of making a decision. That this whole movement toward maturity that I was talking about did not come across to me.



Q. Father Schindler, are you trying to explain to us then that John is still perhaps a child in terms of moral capacity?

A. That's certainly what has come across to me, yes.

MS. SHEARER: We have no further questions at this point, your Honor.

THE COURT: Cross.

MR. DOORY: Yes. Thank you, your Honor.

[160] CROSS-EXAMINATION

BY MR. DOORY:

Q. Before I really get into Cross-Examination, Father, did you say you graduated from Mt. St. Mary's?

A. No. From St. Mary's Seminary in Baltimore.

Q. I thought you were saying you were a classmate of mine. You are not, as it turns out, a psychologist of any sort, are you? I mean, you don't have any degrees in psychology?

A. No degrees in psychology.

Q. You are not a licensed clinical psychologist in the state of Maryland?

A. No.

Q. And you do not have a medical degree?

A. No.

Q. So you are not a licensed psychiatrist in the state of Maryland?

A. That's correct.

Q. Now, Father, this is the form the jury is going to use. Are you familiar with this form?

A. No. I have never seen it.

Q. You've never seen it?

A. No.

[161] Q. Well, you have never seen the form?

A. No. I have never seen that.

Q. Let me direct your attention to what is referred to as Mitigating Circumstance Number Four. You heard the opening argument?

A. Yes.

Q. You understand what we're talking about?

A. Yes.

Q. Now Mitigating Circumstance Number Four says that the murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance. Since you are not a clinical psychologist or medical doctor, you are incapable of giving us an expert opinion as to whether or not the defendant has a mental incapacity; is that correct?

A. Yes. And I should say that I have, as was explained in the expertise, a license in the area of ethics and it is precisely in the area of ethics that I'm trying to offer some insight into how to make judgments on a person. It would seem [162] to me if I understood what went on before in the Opening Arguments, that this would fall under Number Eight rather than Number Four.

Q. Totally different from what the law sets out—

MS. SHEARER: Objection.

THE COURT: Overruled.

A. It would seem to me that if the law says that there are other facts that can specifically be set forth, it would seem to me that one of the factors that could be included in there would be moral capacity.



Q. All right. But certainly nothing you can present to us will answer whether or not the defendant has a mental incapacity, mental disorder or emotional disturbance?

A. Absolutely not. That is not my competence. My competence is in terms of what moral capacity can this person have and as I pointed out, my reason for bringing this up is that in terms of trying to assess guilt and punishment, it seems to me that really it's our common way of acting, our common way of proceeding, of looking at the moral capacity. That is the area that I'm seeking to—

[163] Q. I think I understand that which I didn't before. How long did you get a chance to spend with the defendant?

A. I spent about fifty minutes with Mr. Booth.

Q. Fifteen Minutes?

A. Fifty minutes.

Q. Fifty minutes. That was when, Father?

A. That was last Thursday. I believe this past Thursday.

Q. And it was at that time that you analyzed his moral capacity?

A. Yes.

Q. Is there a test that one can be given like an I.Q. test to measure that?

A. Not that I'm aware of. I believe what is involved is just trying to have or to begin to have a sense of really what morality is all about, of what moral development is all about, of what moral capacity is all about and speaking to a person and trying to get an insight into where they are and how they can proceed and relate to these things.

Q. And that is basically an impression that you get after discussing various things with him?

[164] A. Yes. Although I would go a little stronger than just impression. I believe that you can get a rather solid insight into people and how they perceive things morally.

Q. Well, Father, this area is completely new to me and I don't mean to be insulting here, but could somebody else disagree with you after listening to the same information?

MS. SHEARER: Objection.

THE COURT: Overruled.

A. Morality is not an exact science. I mean it's not like you can put a person into a test tube and then come out in that sense. There is always the possibility of that people can disagree.

Q. But after fifty minutes, you felt comfortable with rendering an expert opinion?

A. Yes. And the reason I would do so, feel comfortable, is that first of all, I had since a training in this and had really done an awful lot of work in the area of moral development. The other is in my role as Priest. Because in hearing confessions, precisely what you are doing is listening to people, but trying to assess where they are and helping them move beyond that. I [165] mean actually I get a lot more time do that than I usually do.

Q. Father, when you are hearing confessions, you are talking to people who have come for penance to receive absolution because they have done something that has offended their conscience; is that correct?

A. That's correct.

Q. Isn't that entirely different than a moral capacity evaluation which is what you are talking about here?

A. Certainly, it's not the same thing. I mean I don't want to say it's the exact same thing. I didn't go and hear Mr. Booth's confession last Thursday at all. In the experience of hearing confessions, one of the things that we do or I do is try to help a

person come to grips with their own feelings of guilt. At the same time, we're also into a development or growth issue that when I am helping somebody come to grips with their conscience, I am also helping them try to understand where they are and how they move so that this whole issue of assessment of where a person is morally is an intrinsic part of it.

[166] Q. Let me ask you this, Father, in the confessional, have you ever had anybody trying to con you? Is there any reason for anybody to try to con you?

A. If they have done it, I have not been aware of it. I mean it's reasonably not a situation where people like to find themselves in and to go there with the purpose of conning, I've just never had it.

Q. Father, have you ever testified in a Death Penalty case before?

A. Never have.

Q. So that's why you have never come in contact with this methodology of forming, coming to the conclusion—

A. Yes.

Q. When were you contacted in this case?

MS. SHEARER: Objection, you Honor.

THE COURT: Overruled. Just give us the time.

A. Can you repeat the question?

Q. When were you contacted in this case?

A. In this case, a week to ten days ago.

Q. So after the guilt or innocence phase of the case?

[167] A. That's correct.

Q. It was impossible for you to be here to hear the evidence of the case?

A. That's correct. Although, as was pointed out at the beginning of my testimony, I have had the chance to read a lot of materials and to brief on it.

Q. Now, Father, when you were contacted, did you know that the defense had asked each perspective juror their religion?

A. No. I did not know that.

Q. You didn't?

A. No. I did not.

Q. Well, let's again get down to the bottom line here. You are talking about an underdeveloped conscience; is that a fair term?

A. Yes. Underdeveloped in the sense that someone in calendar years is an adult and does not have a conscience and goes along with that. Yes.

Q. And if I understood you correctly, you indicated that the religious education of the person and their sense of being loved are two of the key factors in developing the conscience?

A. I don't know if I talked about religious convictions. I said, you know, religious values.

[168] Q. Religious values, yes.

A. Yes. I said that those are the key factors, yes.

Q. And you did hear Sarah Bailey, this man's grandmother, didn't you?

A. Yes, I did.

Q. She testified about her religious background, the defendant's birth, her religious way of life and her intense love for this man?

A. That's correct.

Q. Father, no matter how underdeveloped one's conscience is, is it possible that one does not know that it is wrong to take a friend with him, walk two doors down, burst into their neighbors' home, grab poor old people, tie them up, gag them, bind their hands and then take knives and stab them to death, each one of them stabbed twelve times? Doesn't anyone, doesn't a child of seven, the lowest age recognized by the law understand that that is wrong?

A. It's a difficult answer to give in terms of just plain yes or no because the point that I was trying to make in my testimony was that it's when you are looking at a person, even though for example, theoretically, a person can know [169] something is right or wrong, does not know necessarily that it comes in to play in a particular situation. As I explained, John knows the Golden Rule and yet at the same time when he goes to play that out, to act upon it in a concrete situation, there's no influence of that principle. It gets down to a sense of self-survival of the individual and on top of that, what I've also tried to emphasize was that in trying to not only find out now what was wrong, but to assess the moral responsibility.

(Whereupon, the Court Reporter changed paper.)

A. As I was saying that not only in terms of an ethical perspective are we looking at the wrongness of it, but in terms of a trying to assess the moral responsibility which really comes from the level of moral maturity that a person has and that's precisely what a person is trying to get out.

MR. DOORY: Thank you, Father. No further questions.

MS. SHEARER: We have no further questions of Father Schindler.

THE COURT: May Father Schindler be

\* \* \* \*

[EXHIBIT 25]

STATE OF MARYLAND  
DEPARTMENT OF PUBLIC SAFETY AND  
CORRECTIONAL SERVICES  
DIVISION OF PAROLE AND PROBATION

Victim Impact Statement

Case Name: BOOTH, JOHN E.  
Court Case No.: 18318813, 14, 15

Victim's Name: Bronstein, Irvin & Rose (deceased)  
(See attached statement).

I. Economic Loss

A. Damages Suffered

- |  |          |
|--|----------|
| 1. Value of property lost or destroyed             | \$ _____ |
| 2. Hospital, medical expense(s)                    | \$ _____ |
| 3. Lost income or wages                            | \$ _____ |
| 4. Miscellaneous expense(s) (List type and amount) |          |
| a) _____   | \$ _____ |
| b) _____   | \$ _____ |
| Total Loss   | \$ _____ |

B. Reimbursement Received

- |                                   |          |
|-----------------------------------|----------|
| 1. Property insurance             | \$ _____ |
| 2. Hospital/medical insurance     | \$ _____ |
| 3. Sick leave pay                 | \$ _____ |
| 4. Other (List source and amount) |          |
| a) _____                          | \$ _____ |
| b) _____                          | \$ _____ |
| Total Reimbursement               | \$ _____ |

C. Economic Loss Not Reimbursed (A minus B) \$ \_\_\_\_\_

\* Indicates information not supported by bill, cancelled check, receipt, or written estimate.



## II. Physical Injury (type, seriousness, and permanence)

Irvin and Rose Bronstein died as a result of multiple stab wounds.

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## III. Psychological Impact

### A. Psychiatric or psychological counseling required by victim.

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### B. Effect upon victim's personal welfare or familial relationships.

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## IV. Additional Information

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Field Supervisor      Date

Parole & Probation Agent Date

## VICTIM IMPACT STATEMENT

Case Name: BOOTH, JOHN E.

The following Victim Impact Statement was prepared by Agent Michelle Swann on 6/21/84, in the case against co-defendant Willie Re: Subsequent contact with the victim's son, Barry Bronstein, via Assistant State's Attorney Tim Doory on 9/25/84, indicates that the following statement is valid and current, and that the family has nothing else to add.

"Mr. and Mrs. Bronstein's son, daughter, son-in-law, and granddaughter were interviewed for purposes of the Victim Impact Statement. There are also four other grandchildren in the family. the victims' son reports that his parents had been married for fifty-three years and enjoyed a very close relationship, spending each day together. He states that his father had worked hard all his life and had been retired for eight years. He describes his mother as a woman who was young at heart and never seemed like an old lady. She taught herself to play bridge when she was in her seventies. The victims' son relates that his parents were amazing people who attended the senior citizens' center and made many devout friends. He indicates that he was very close to his parents and talked to them every day. The victims' daughter also spent lots of time with them.

The victims' son saw his parents alive for the last time on May 18th. They were having their lawn manicured and were excited about the onset of spring. He called them on the phone that evening and received no answer. He had made arrangements to pick Mr. Bronstein up on May 20th. They were both to be ushers in a granddaughter's wedding and were going to pick up their tuxedos. When he arrived at the house on May 20th he noticed that his parents' car wasn't there. A neighbor told him she hadn't seen the car in several days and he knew something was wrong. He went to his parents' house and found them murdered. He called his sister crying and told her to come right over because something terrible had happened and their parents were both dead.

The victims' daughter recalls that when she arrived at her parents' house, there were police officers and television crews everywhere. She felt numb and cold. She was not allowed to go into the house and so she went to a neighbor's home. There were people and reporters everywhere and all she could feel was cold. She called her older daughter and told her what had happened. She told her daughter to get her husband and then tell her younger daughter what had happened. The younger daughter was to be married two days later.

The victims' granddaughter reports that just before she received the call from her mother she had telephoned her grandparents and received no answer. After her mother told her what happened she turned on the television and heard the news reports about it. The victims' son reports that his children first learned of their grandparents death from the television reports.

Since the Jewish religion dictates that birth and marriage are more important than death, the granddaughter's wedding had to proceed on May 22nd. She had been looking forward to it eagerly, but it was a sad occasion with people crying. The reception, which normally would have lasted for hours, was very brief. The next day, instead of going on her honeymoon, she attended her grandparents' funerals. The victims' son, who was an usher at the wedding, cannot remember being there or coming and going from his parents' funeral the next day. The victims' granddaughter, on the other hand, vividly remembers every detail of the days following her grandparents' death. Perhaps she described the impact of the tragedy most eloquently when she stated that it was a completely devastating and life altering experience.

The victims' son states that he can only think of his parents in the context of how he found them that day, and he can feel their fear and horror. It was 4:00 p.m. when he discovered their bodies and this stands out in his mind. He is always aware of when 4:00 p.m. comes each day, even when he is not near a clock. He also wakes up at 4:00 a.m. each morning. The victims'

son states that he suffers from lack of sleep. He is unable to drive on the streets that pass near his parents' home. He also avoids driving past his father's favorite restaurant, the supermarket where his parents shopped, etc. He is constantly reminded of his parents. He sees his father coming out of synagogues, sees his parents' car, and feels very sad whenever he sees old people. The victims' son feels that his parents were not killed, but were butchered like animals. He doesn't think anyone should be able to do something like that and get away with it. He is very angry and wishes he could sleep and not feel so depressed all the time. He is fearful for the first time in his life, putting all the lights on and checking the locks frequently. His children are scared for him and concerned for his health. They phone him several times a day. At the same time he takes a fearful approach to the whereabouts of his children. He also calls his sister every day. He states that he is frightened by his own reaction of what he would do if someone hurt him or a family member. He doesn't know if he'll ever be the same again.

The victims' daughter and her husband didn't eat dinner for three days following the discovery of Mr. and Mrs. Bronstein's bodies. They cried together every day for four months and she still cries every day. She states that she doesn't sleep through a single night and thinks a part of her died too when her parents were killed. She reports that she doesn't find much joy in anything and her powers of concentration aren't good. She feels as if her brain is on overload. The victims' daughter relates that she had to clean out her parents' house and it took several weeks. She saw the bloody carpet, knowing that her parents had been there, and she felt like getting down on the rug and holding her mother. She wonders how this could have happened to her family because they're just ordinary people. The victims' daughter reports that she had become noticeably withdrawn and depressed at work and is now making an effort to be more outgoing. She notes that she is so emotionally tired because she doesn't sleep at night, that she has a tendency to fall asleep when she attends social events such as dinner parties or the symphony. The victims' daughter states that wherever she



goes she sees and hears her parents. This happens every day. She cannot look at kitchen knives without being reminded of the murders and she is never away from it. She states that she can't watch movies with bodies or stabbings in it. She can't tolerate any reminder of violence. The victims' daughter relates that she used to be very trusting, but is not any longer. When the doorbell rings she tells her husband not to answer it. She is very suspicious of people and was never that way before.

The victims' daughter attended the defendant's trial and that of the co-defendant because she felt someone should be there to represent her parents. She had never been told the exact details of her parents' death and had to listen to the medical examiner's report. After a certain point, her mind blocked out and she stopped hearing. She states that her parents were stabbed repeatedly with viciousness and she could never forgive anyone for killing them that way. She can't believe that anybody could do that to someone. The victims' daughter states that animals wouldn't do this. They didn't have to kill because there was no one to stop them from looting. Her father would have given them anything. The murders show the viciousness of the killers' anger. She doesn't feel that the people who did this could ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this. She feels that the lives of her family members will never be the same again.

The victims' granddaughter states that unless you experience something like this you can't understand how it feels. You are in a state of shock for several months and then a terrible depression sets in. You are so angry and feel such rage. She states that she only dwells on the image of their death when thinking of her grandparents. For a time she would become hysterical whenever she saw dead animals on the road. She is not able to drive near her grandparents' house and will never be able to go into their neighborhood again. The victims' granddaughter also has a tendency to turn on all the lights in her house. She goes into a panic if her husband is late coming home

from work. She used to be an avid reader of murder mysteries, but will never be able to read them again. She has to turn off the radio or T. V. when reports of violence come on because they hit too close to home. When she gets a newspaper she reads the comics and throws the rest away. She states that it is the small everyday things that haunt her constantly and always will. She saw a counselor for several months but stopped because she felt no one could help her.

The victims' granddaughter states that the whole thing has been very hard on her sister too. Her wedding anniversary will always be bittersweet and tainted by the memory of what happened to her grandparents. This year on her anniversary she and her husband quietly went out of town. The victims' granddaughter finds that she is unable to look at her sister's wedding pictures. She also has a picture of her grandparents, but had to put it away because it was too painful to look at it.

The victims' family members note that the trials of the suspects charged with these offenses have been delayed for over a year and the postponements have been very hard on the family emotionally. The victims' son notes that he keeps seeing news reports about his parents' murder which show their house and the police removing their bodies. This is a constant reminder to him. The family wants the whole thing to be over with and they would like to see swift and just punishment.

As described by their family members, the Bronsteins were loving parents and grandparents whose family was most important to them. Their funeral was the largest in the history of the Levinson Funeral Home and the family received over one thousand sympathy cards, some from total strangers. They attempted to answer each card personally. The family states that Mr. and Mrs. Bronstein were extremely good people who wouldn't hurt a fly. Because of their loss, a terrible void has been put into their lives and every day is still a strain just to get through. It became increasingly apparent to the writer as she talked to the family members that the murder of Mr. and Mrs. Bronstein is still such a shocking, painful, and devastating mem-



ory to them that it permeates every aspect of their daily lives. It is doubtful that they will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them."

[95] ATTACHMENT G

\* \* \* \*

IN THE CIRCUIT COURT FOR  
BALTIMORE CITY

Case No. 18318812-17

STATE OF MARYLAND

vs.

JOHN BOOTH Aka MARVIN BOOTH

FINDING AND SENTENCING DETERMINATION

SECTION I

Based upon the evidence, we unanimously find that each of the following aggravating circumstances that is marked "yes" has been proven Beyond A Reasonable Doubt. Each of the aggravating circumstances that has not been so proven is marked "no."

	YES	NO
1. The victim was a law enforcement officer who was murdered while in the performance of the officer's duty.		X
2. The defendant committed the murder at a time when confined in a correctional institution.		X
3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.		X
4. The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.		X
5. The victim was a child abducted in violation of Code, Article 27, § 2.		X

- |   |   |
|---|---|
| 6. The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.  | X |
| 7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration. | X |
| 8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.   | X |
| 9. The defendant committed more than one offense of murder in the first degree arising out of the same indictment.  | X |
| 10. The defendant committed the murder while committing or attempting to commit robbery, arson, rape in the first degree or sexual offense in the first degree.                             | X |

(If one or more of the above are marked "yes", complete Section II. If all of the above are marked "no", do not complete Sections II and III.)

## [97] SECTION II

Based upon the evidence, we unanimously find that each of the following mitigating circumstances that is marked "yes" has been proven to exist by a Preponderance Of The Evidence. Each mitigating circumstance that has not been so proven is marked "no".

YES NO

1. The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduc-

- |  |   |
|--|---|
| tion, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence. | X |
| 2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.  | X |
| 3. The defendant acted under substantial duress, domination, or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.  | X |
| 4. The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.                            | X |
| 5. The defendant was of a youthful age at the time of the crime.   | X |
| [98]   |   |
| 6. The act of the defendant was not the sole proximate cause of the victim's death.  | X |
| 7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.  | X |
| 8. Other facts specifically set forth below constitute mitigating circumstances:   | X |

### A Family Environment

1. Child Neglect
2. Lack of Strong Father Image

(Use reverse side if necessary)

**[99] SECTION III**

Based on the evidence, we unanimously find that it has been proven by A Preponderance Of The Evidence that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked "yes" in Section I.

X

**DETERMINATION OF SENTENCE**

Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instruction:

1. If all of the answers in Section I are marked "No," enter "Life Imprisonment."
2. If Section III was completed and was marked "Yes," enter "Life Imprisonment."
3. If Section II was completed and all of the answers were marked "No," then enter "Death."
4. If Section III was completed and was marked "No," enter "Death."

We unanimously determine the sentence to be Death.

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Jurors Signatures

\* \* \* \*

IN THE CIRCUIT COURT FOR  
BALTIMORE CITY

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Ind. No. 18318812-17

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\* \* \* \*

**REPORT OF TRIAL JUDGE**

Filed Feb. 14, 1985

**[73] I. Data Concerning Defendant**

- A. Date of Birth 11-19-53
- B. Sex Male
- C. Race Black
- D. Address 3416 Rockwood Avenue  
Baltimore, Maryland 21215
- E. Length of Time in Community 15 months
- F. Reputation in Community Poor
- G. Family Situation and Background See Attachment A
  1. Situation at time of offense (e.g., defendant's living situation including marital status and number and age of children) See Attachment
  2. Family history (e.g., family history including pertinent data about parents and siblings) See Attachment A
- H. Education See Attachment B
- I. Work Record See Attachment C
- J. Prior Criminal Record and Institutional History (e.g., prior convictions, disposition, and periods of incarceration.
- [74] K. Military History None**
- L. Pertinent Physical or Mental Characteristics or History None Known



M. Other Significant Data About Defendant. See Attachment E (HEALTH)

II. Data Concerning Offense See Attachment F

A. Briefly describe facts of offense (e.g., time, place, and manner of death; weapon, if any; other participants and nature of participation) See Attachment F

B. Was there any evidence that the defendant was under the influence of alcohol or drugs at the time of the offense? If so describe. No

C. Did the defendant know the victim prior to the offense? Yes

1. If so, describe relationship.

Relationship was casual as a neighbor.

2. Did the prior relationship in any way precipitate the offense? If so, explain.

Yes. The defendant reportedly killed the victims because they recognized him and his nephew.

D. Did the victim's behavior in any way provoke the offense? If so, explain. No

E. Data Concerning Victim(s)

1. Name Irvin Bronstein and Rose Bronstein

2. Date of Birth ages 78 and 75

[75] 3. Sex Irvin Bronstein (male) Rose Bronstein (female)

4. Race White

5. Length of time in community 18 years

6. Reputation in community Excellent

F. Any other significant data about offense No

III. A. Plea entered by Defendant:

Not Guilty X; Guilty; Not Guilty by reason of Insanity

B. Mode of Trial

Court; Jury X.

If there was a jury trial, did defendant challenge the jury selection or composition? If so, explain. No

C. Counsel

1. Name(s) Roger Brown and Donna Shearer, Public Defenders

2. Address Tower Building, Office of the Public Defenders

222 East Baltimore Street

Baltimore, Maryland 21202

3. Appointed or retained (If more than one attorney represent defendant, provide data on each and include stage or proceedings at which the representation was furnished.)

Appointed

D. Pre-Trial Publicity—Did defendant request a mistrial or a [76] change of venue on the basis of publicity? If so, explain. Attach copies of any motions made and exhibits filed. No

E. Was defendant charged with other offenses arising out of the same incident? If so, list charges; state whether they were tried at same proceeding, and give disposition. They were tried in the same proceedings

18318814 — Life consecutive to present sentences

18318815 — 20 yrs. consecutive to 8814

18318816 — 20 yrs. consecutive to 8815

18318817 — 20 yrs. consecutive to 8816.

IV. Data Concerning Sentencing Proceeding

A. List aggravating circumstances(s) upon which the State relied in the pretrial notice. #10. The defendant committed the murder while committing or attempting to commit robbery, arson, rape in the first degree or sexual offense in the first degree.

B. Was the proceeding conducted before the same judge as trial? yes

before same jury yes

If the sentencing proceeding was conducted before a jury other than the trial jury, did the defendant challenge the selection or composition of the jury? If so, explain.

C. Counsel—If counsel at sentencing was different from trial counsel, give information requested in III C above. N/A

D. Which aggravating and mitigating circumstances were raised by the evidence: Aggravating-Numbers 9 & 10 (State abandoned #9 and submitted to Jury only #10) Mitigating-Number 8-A. Family Environment, 1. Child Neglect 2. Lack of Strong Father Image, and under developed moral character.

[77] E. On which aggravating and mitigating circumstances were the jury instructed?

Aggravating-Number 10

Mitigating — All listed in Statute plus those argued by Defense.

F. Sentence imposed: Life imprisonment X; Death X

#### V. Chronology

Date of Offense May 18, 1983

Arrest June 7, 1983

Charge Murder two times, Robbery with deadly weapon two times, Conspiracy

Notification of intention to seek penalty of death 8-3-83

Trial (guilt/innocence — began and ended

Began: September 18, 1984

Ended: October 4, 1984

Post-trial Motions Disposed of October 19, 1984

Sentencing Proceedings — began and ended

Began: October 15, 1984

Ended: October 16, 1984

Sentence Imposed October 19, 1984

VI Recommendation of trial court as to whether imposition of sentence of death is justified. The jury followed the Statute and Instructions and considered all mitigating factors submitted to them by the defendant finding that they did not outweigh the aggravating

[78] The imposition of the death penalty is justified based on the pre-planning of the incident which led to the death of the victims, the continuing involvement of the defendant in looting the home of the victims after their death and the manner of death i.e., the binding and gagging of the victims with a hood

being placed over the head of the male victim before being stabbed.

VII. A copy of the Findings and Sentencing Determination made in this action is attached to and made a part of this report. See Attachment G

\_\_\_\_\_  
Judge Edward J. Angeletti  
Circuit Court for Baltimore City

#### CERTIFICATION

I certify that on the \_\_\_\_\_ day of \_\_\_\_\_ 1984 I hand delivered copies of this report to counsel for the parties for comment and have attached any comments made by them to this report.

\_\_\_\_\_  
Judge Edward J. Angeletti

## ATTACHMENT A

### Family History

[79] Booth is the oldest of six children (five sisters) born (11/19/53) to the 3/24/57 legal union of John Booth, Sr., currently age 52, of 4027 Annellen Road, and June Sparrow (Nee: Curtis), currently age 58, of 3416 Rockwood Avenue. The defendant's parents separated in 1961, at which time Booth was reportedly eight years old. The defendant's father maintained only irregular contact and provided only occasional support after the separation. As a result the Defendant's mother lost her home due to foreclosure and had to seek employment, which subsequently resulted in a neglect charge in 1964. Her children were placed in foster care until 1966. The year prior to the fostercare commitment of her children, the defendant's mother relates that she gave birth to a son, Marvin Booth as a result of a casual relationship. This child was committed to foster care, during which period the child died at age seventeen months.

Upon the defendant's return from foster care to his mother's care at age thirteen, he was reportedly no serious behavioral problem in the home. The defendant's mother acknowledges that Booth did get into trouble outside the home, which resulted in his juvenile commitment from 1968 until 1970. From that point on, commenced an almost continuous period of adult incarceration to the present time. The defendant's mother blames the correctional system for her son's continued illegal activity, citing the lack of rehabilitation within the institutions. She also believes that the defendant is innocent of the murder charges for which he has been accused. Mrs. Sparrow had no knowledge of drug or alcohol abuse for the defendant.

The defendant's mother married Weldon Sparrow, currently age 50, on 7/28/81. Booth reportedly enjoyed a good relationship with his stepfather until his mother and stepfather separated in 1975. A half-brother for the defendant, Timothy Sparrow resulted from this union.

The following information was obtained from the defendant's institutional file. A 1978 Admission Summary indicated that the defendant engaged in a common law relationship with Clara Patricia Ricks, 2904 Belmont Avenue and that three children resulted from this relationship: Larry, Marvin, and Latania, ages eleven, five and three respectively in 1978. The defendant also acknowledged (Admission Summary, 1978) fathering Carroll Thompson, age eight in 1978, who was residing with his mother, Delilah Thompson in Brooklyn, New York. Neither the defendant's mother nor his current wife had any knowledge of these children. In his most recent institutional Admission Summary (1/84), Booth reported having no children. On the questionnaire completed by Booth for this report, he acknowledge only the child by Delilah Thompson during a common law relationship.

On 6/2/83, Booth married Jewell Edwards, currently age 23, of 2658 Harford Road. No children resulted from his union, which was abruptly interrupted five days later with Booth's arrest on the instant offense. Jewell Booth indicates that she has known the defendant for approximately four years and she believes that he is innocent and incapable of committing the serious and violent crimes for which he has been accused. Mrs. Booth relates that she never witnessed Booth abusing alcohol or drugs; however, she did believe that he had a prior problem with heroin use. Mrs. Booth has no immediate plans to alter her marital status despite the defendant's current legal status.



**ATTACHMENT B****Education**

[80] Institutional records indicated that Booth withdrew from Calverton Junior High School in the ninth grade. He reportedly earned his G.E.D. during incarceration at the Maryland Correctional Training Center in 1973. Booth reported via his questionnaire that he earned thirteen college credits at Hagerstown and Essex Community Colleges (1/79-12/79) while incarcerated. His education was interrupted upon his escape on 12/30/79.

**ATTACHMENT C****Employment Record**

[81] Parole records indicated that Booth was last employed in maintenance for the Division of Social Work Services from 1/82 until 3/82, when funding was terminated. Prior to that, Booth was incarcerated almost continually for twelve years. Between his 9/77 release and his 6/78 arrest for Assault with Intent to Maim, the defendant was employed briefly as a painter for one Robert Shrwer. It was this employer whom the defendant assaulted reportedly prompted by unpaid wages, which led to Booth's five year sentence on 11/28/78. This information was obtained from Booth's 1978 Admission Summary — Institutional file.

[82] ATTACHMENT D

PRIOR RECORD: Juvenile

Date	Place	Offense	Date and Disposition	Source
9/8/64	Baltimore, MD	Dependent Neglected	10/7/64, Committed to the care of the Department of Public Welfare.	Juvenile Services
9/8/67	Baltimore, MD	Pet. #12144	3/7/66, Commitment rescinded.	Administration
12/28/67	Baltimore, MD	Pet. #123057	11/6/67, Probation granted. 5/20/68, Violation of Probation, sustained - commitment to Boy's Village.	"
5/6/68	Baltimore, MD	Pet. #125483	5/12/70, Commitment rescinded.	"
5/28/68	Baltimore, MD	Pet. #125902	2/23/68, Dismissed with warning - continued on probation.	"
2/28/69	Baltimore, MD	Pet. #131152	7/12/68, Dismissed.	"
8/31/70	Baltimore, MD	Pet. #141252, #141253, #141254	7/12/68, Dismissed due to commitment on #12144.	"
11/6/70	Baltimore, MD	Pet. #142587	12/31/69, Dismissed.	"
			9/23/70, Jurisdiction waived.	"
			11/25/70, Jurisdiction waived.	"

The nature of the charges for the above petitions were requested via the Juvenile Clerk's Office from Annapolis on 9/25/84, but have not been received as of this writing. Further information is not available due to the customary destruction of files after ten years.

[83] ATTACHMENT D Continued

PRIOR RECORD: Juvenile

Date	Place	Offense	Date and Disposition	Source	Counsel
2/12/69	Baltimore, MD	Attempted Burglary	2/26/69, Dismissed by Grand Jury.	F.B.I.	
As: Andrew Calvin Barnes 4/27/69	Baltimore, MD	Interfering with Police Officer	Guilty, 30 days.	F.B.I.	Unknown
As: Robert John Curtis 11/29/69	Baltimore, MD	Disorderly Conduct	Probation Without Verdict.	F.B.I.	"
As: John Edward Booth 4/1/70	Baltimore, MD	Unauthorized Use	4/2/70, Guilty, 9 months Commissioner of Correction, Paroled 8/7/70.	"	"
As: John E. Booth 8/29/70	Baltimore, MD	Robbery (2-counts) Robbery, Theft)	5/21/71, Baltimore City Criminal Court, Judge Sodaro, Guilty - 1st and 4th counts, 4 years, 18 months, concurrent.	F.B.I., Baltimore City Criminal Court	Yes

[84] ATTACHMENT D Continued

PRIOR RECORD: Juvenile

Date	Place	Offense	Date and Disposition	Source	Counsel
As: John Edward Booth, Jr. 3/18/72	Pikesville, MD	Assault with Intent to Maim (Inmate)	5/21/72, Washington County Circuit Court, Judge Ruthledge, Guilty — 3 years consecutive.	F.B.I.	"
As: John Edward Booth 3/13/74	Hagerstown, MD	Possession of Marijuana	7/3/74, Guilty, 1 year.	"	Unknown
10/31/75	Baltimore, MD	Assault & Robbery	12/17/75, Failed to Appear, 5/20/76, Guilty of Assault, Larceny; 2 yrs. DOC.	Baltimore, City Police Dept., F.B.I.	Unknown
As: John E. Booth 2/7/76	Baltimore, MD	Interfering with Police Officer	5/24/76, Baltimore City Criminal Court, Judge Sodaro, Guilty — 60 days.	Baltimore City Police Dept.	Unknown
As: Juan Kevin Roth 4/24/76	Baltimore, MD	Indecent Exposure, Failure to Appear	5/6/76, Maryland District Court, Judge Baer. Guilty — 90 days.	"	"

[84] ATTACHMENT D Continued

PRIOR RECORD: Juvenile

Date	Place	Offense	Date and Disposition	Source	Counsel
As: Juan Jackson 4/25/76	Baltimore, MD	Shoplifting	5/6/76, Maryland District Court, Judge Baer. Guilty — 30 days.	"	"
As: Marvin Booth 1/6/78	Baltimore, MD	Larceny. Receiving Stolen Goods, Disorderly Conduct	1/26/78, Maryland District Court, Judge Lamsdin, Stet.	"	"
As: Marvin Curtis Booth 6/2/78	Baltimore, MD	Assault	8/7/78, Baltimore City Criminal Court, Judge Baylor. Guilty — 30 days from 6/27/78.	"	Yes
As: Marvin Curtis Booth 6/27/78	Baltimore, MD	1) Assault with Intent to Maim 2) Unauthorized Use 3) Robbery with a Deadly Weapon 4) Larceny 5) Receiving Stolen Goods	11/28/78, Baltimore City Criminal City Criminal Court, Judge, J. Thomas 1) Guilty: 5 years. 2) Guilty: 4 yrs., concurrent. 3), 4), and 5) Stet.	Baltimore City Police Dept., Baltimore City Criminal Court	"



[85] ATTACHMENT D Continued

PRIOR RECORD: Juvenile

Date	Place	Offense	Date and Disposition	Source	Counsel
As: Marvin C. Booth 10/27/78	Baltimore, MD	Attempted Escape	1/31/79, Baltimore City Criminal Court, Judge Allen, Stet.	Baltimore City Police Dept., Baltimore City Criminal Court	
As: Marvin C. Booth 1/28/80	Baltimore, MD	1) Burglary 2) Escape	1) Stet. 2) 5/14/80, Anne Arundel County Circuit Court, Guilty — 90 days consecutive.	F.B.I. Parole Files	Unknown

23

[85] ATTACHMENT D Continued

PRIOR RECORD: Juvenile

Date	Place	Offense	Date and Disposition	Source	Counsel
As: Marvin Curtis Booth 6/7/73	Baltimore, MD	Murder, 1st Degree (Felony Murder) — 2 counts, Robbery with a Deadly Weapon — 2 counts, Conspiracy Escape	10/4/84, Circuit Court for Baltimore City, Judge Angeletti, Present Offense.	Baltimore City Police Dept.	Yes
12/14/83	Baltimore, MD		3/5/84, Circuit Court for Baltimore City, Guilty — 6 months.	Court for Baltimore City	
As: John E. Booth 8/5/83	Baltimore, MD	1) Murder, 1st degree, 2) Robbery with a Deadly Weapon, 3) Deadly Weapons	1/27/84, Circuit Court for Baltimore City, Judge Greenfield, 1) Guilty — Natural Life 2) Guilty — 20 years, consecutive 3) Nolle Prosequi	Circuit Court for Baltimore City	"

23

**ATTACHMENT D****Prior Record Continued****Institutional History**

Juvenile records indicate that Booth was committed to Boy's Village on 5/20/68, after violating his probation. He reportedly remained there for two years until his commitment was rescinded on 5/12/70. During that two year period, Booth went A.W.O.L. and became involved in other illegal activity.

As an adult, Booth was first incarcerated on 4/2/70, on a nine month sentence for Unauthorized Use. Institutional records indicate that the defendant served approximately four months at the Maryland Correctional Training Center until being paroled on 8/7/70.

Within the month, Booth was arrested on two counts of Robbery (Robbery and Theft), for which he was convicted on 5/21/71, receiving concurrent sentences of four years and eighteen months (effective 8/29/70). While incarcerated at the Maryland Correctional Institution, Booth staffed a fellow inmate, resulting in a consecutive three year sentence for Assault with Intent to Maim imposed on 5/21/72. Two years later, while in the Camp system, Booth was charged with Possession of Marijuana. This resulted in the imposition of a concurrent one year sentence on 7/3/74. Booth was returned to the Maryland Correctional Institution, where he remained until being paroled (4/29/75) after serving nearly five years of his sentences totalling seven years.

Six months after his release, Booth was arrested for Assault and Robbery, which charges were subsequently reduced to Assault, Larceny. On 5/20/76, a two year sentence was imposed for those charges. The defendant was sent to the Maryland Correctional Training Center and then transferred to the Brockbridge Correctional Facility, where he was released on 9/15/77 due to a labor day commutation.

On 11/28/78, Booth received concurrent sentences of five and four years for Assault with Intent to Maim and Unauthorized Use (effective 6/27/78). On 12/30/79, the defendant escaped from the Brockbridge Correctional Facility Annex. He was arrested on 1/28/80, and subsequently received a ninety day consecutive sentence on 5/14/80. Booth was eventually paroled from Brockridge on 1/27/82, after serving three and one-half years of his five years, ninety day sentence.

On 3/5/84, Booth received a six month sentence for Escape while being detained on the instant offense.

**[87] Parole & Probation History:**

Juvenile records indicated that Booth was granted juvenile probation on 11/6/67; however, the defendant violated his probation resulting in a commitment to Boy's Village six months later on 5/20/68.

As an adult, the defendant has experienced parole supervision three times between 1970 and 1983. The first two periods ended in revocation (1970, 1976) as a result of subsequent arrests and convictions. His most recent parole case commenced with his 1/27/82 release. At that time he was reportedly employed in maintenance by the Division of Social Work Services, which position he lost two months later due to loss of funding. The defendant did not work full-time after that time. Booth reportedly received a Department of Social Services grant until 4/83, at what time he was terminated for not fulfilling the requirement to be on methadone maintenance. Parole records also indicate that Booth was to participate in drug treatment at the Jones Falls Community Corporation; however, his early attendance was subsequently considered questionable due to the discovery of prior friendship between Booth and his counselor Melvin Johnson. The discrepancy in attendance records for Booth was found upon Johnson's departure from the program during 12/82. Larry Moritz, the defendant's counselor after Johnson, confirmed Booth's irregular attendance; however, the defendant was continued in the program until his

arrest on 6/7/83. As a result of his arrest on the instant offense, a Retake Warrant was requested on 6/9/83 and issued on 6/23/83; however, as the parole case reached its legal expiration on 10/23/83, and considering the defendant's detention on the instant offense, the parole case was closed administratively on 2/15/84.

## **ATTACHMENT E**

### **Health**

[88] The defendant's 1/84 Admission Summary indicates that Booth is in good health, which he corroborated on his questionnaire. Booth acknowledged to institutional authorities that he was a moderate drinker and had used just almost all drugs. The defendant was paroled during 2/82 with a special condition to take drug therapy. His agent referred him to the Jones Falls Community Corporation for counseling; however, his attendance was sporadic and questionable until his arrest on 6/7/83. (See Parole History). Booth's only known mental health experience consists of correctional institution psychological reports.



## ATTACHMENT F

## Description Of Present Offense

[89] According to the Baltimore City Police offense report (cc#6E43548), on 6/20/83, at 4:08 p.m. officers from the Baltimore City Police Department responded to 3412 Rockwood Avenue to investigate "a man and woman laying on the floor." Upon arriving they were met by Barry Bronstein, who stated that he arrived at his parents' home at approximately 4:00 p.m. and as he opened the front storm door he observed the front door unlocked and ajar. Upon pushing same open, he discovered his mother and father laying on the living room floor and sofa and observed that they were both dead. The officers then entered the home and found Irvin Bronstein laying on his back on the living room sofa. His hands were tied behind his back and a scarf was tied around his mouth. Investigation revealed that he had sustained multiple stab wounds to the upper chest area. Rose Bronstein was laying face down on the living room floor about four feet from her husband. Her hands were tied and she also gagged. A 12" butcher knife with a bent blade was laying alongside her abdomen. Mrs. Bronstein had sustained multiple stab wounds to the face, neck, and upper chest area. Both victims had been last seen alive by their son Barry on 5/18/83 and it was believed that they had been dead for at least thirty-six hours. Investigation on the scene revealed no signs of forced entry. The rear kitchen door was found unlocked and open. Blood stains were found on the door frame, which indicated a possible point of exit by the suspects. Additional information from Barry Bronstein revealed that the victims' automobile, a 1972 Chevrolet Impala, was missing. Further investigation revealed that two T.V.s, various pieces of jewelry, a camera, and silverware had been taken. The entire house had been ransacked by the suspects, who apparently wore gloves.

On 5/25/83 City Police located the 1972 Chevrolet automobile that was stolen in this offense in front of 127 S. Exeter Street. This investigation developed the name of this defendant as one of the people who had been in control of the automobile. On

6/7/83, John Edward Booth and William Reid were arrested and charged accordingly for this offense.

\* \* \* \*

507 A.2d 1098  
 JOHN BOOTH A/K/A MARVIN BOOTH  
 v.  
 STATE OF MARYLAND.

No. 151, Sept. Term, 1984.

COURT OF APPEALS OF MARYLAND.  
 May 7, 1986

BOOTH v. STATE  
 [306 Md. 172 (1986)]

[181] Argued before MURPHY, C.J., SMITH, ELDRIDGE, COLE, RODOWSKY, COUCH and McAULIFFE, JJ.

RODOWSKY, Judge.

We shall affirm the judgments of conviction and death sentence in this case for the reasons set forth below. Of the nineteen issues raised on appeal only issues eight through ten present questions of any novelty. These deal with the right of allocution conferred by a Maryland Rule of Procedure which was made applicable to capital cases as of July 1, 1984.

Appellant, John "Ace" Booth (Booth), and his friend, Willie "Sweetie" Reid (Reid), in order to obtain money for heroin, on May 18, 1983, robbed and murdered an elderly couple in the victims' home. The victims were Irvin Bronstein, age 78, and his wife, Rose, age 75. Their bodies were found by their son on May 20 in the living room of their home. Each had been stabbed in the chest twelve times, after having been bound and gagged. Mr. Bronstein was [182] found reclining face up on the sofa, with a cloth covering his face. Mrs. Bronstein was found face down on the floor. Their home had been ransacked. Property, including television sets, jewelry, and their 1972 Chevrolet Impala automobile, had been taken. The police found the automobile abandoned and partially stripped on the parking lot of

the Flag House high-rise public housing projects in East Baltimore. The police were able to associate Booth with the abandoned car and arrested Booth June 7, 1983.

The first trial of the charges against Booth, before Honorable James W. Murphy, ended in a mistrial on April 23, 1984. See *Booth v. State*, 301 Md. 1, 481 A.2d 505 (1984). At retrial, a jury presided over by Judge Edward J. Angeletti in the fall of 1984 heard both the guilt or innocence phase and the sentencing phase. The jury found Booth guilty of the murder of Mr. Bronstein in the first degree, both premeditated and felony, and found that Booth was a principal in the first degree to that murder for which they imposed the death sentence. The jurors found Booth guilty of murder in the first degree of Mrs. Bronstein for which the court imposed a life sentence.<sup>1</sup> Booth also received three consecutive sentences of twenty years each, the first of which was consecutive to the life sentence, for the robbery of Mr. Bronstein, the robbery of Mrs. Bronstein, and for conspiring with Reid and with his nephew, Darrell Brooks, to rob the Bronsteins.

On this appeal Booth challenges the sufficiency of the evidence against him only as to the charge of conspiracy to rob. Neither Booth nor Reid testified as witnesses at Booth's trial at which the jury could have found the following facts on guilt or innocence.

[183] The Bronsteins lived at 3412 Rockwood Avenue in West Baltimore. Booth, age 29 at the time of the murders, lived with his mother at 3416 Rockwood Avenue. Booth's friend Reid lived with his girlfriend, Veronda "Ronnie" Mazyck and her two sons, age nine and four at the time of the murders, in Ms. Mazyck's apartment at 400 Aisquith Street in East Baltimore. On May 18, 1983, Booth met Reid at Mazyck's apartment at

<sup>1</sup> Willie Reid was the principal in the first degree to the murder of Mrs. Bronstein for which Reid was sentenced to death. In Reid's case we have affirmed the judgments of conviction and ordered further proceedings with respect to the death sentence, without affirmance or reversal of the death sentence. See *Reid v. State*, 306 Md. 9, 501 A.2d 436 (1985).

about 4:00 p.m. Mazyck went out with her children and, when she returned about 8:00 to 8:30 p.m., no one was at home. Reid and Booth returned to the apartment at about 9:00 p.m. They had heroin which Booth, Reid, and Mazyck injected. Reid also had a small brown paper bag filled with jewelry.

When the contents of the bag were spread on a tabletop, Mazyck commented that the jewelry was cheap to which Reid, in the presence of Booth, replied that it was "white people's shit." In response to a question from Mazyck, Reid, in Booth's presence, said he had made a "hustle" which Mazyck interpreted as meaning that "they went out and stole it."

At some point Booth telephoned his girlfriend, Jewell "Judy" Edwards,<sup>2</sup> who lived in the 2600 block of Harford Road, and asked her to meet him at Mazyck's apartment. Booth wanted Edwards to drive a car. She was a licensed operator but Booth, Reid, and Mazyck were not licensed.

Renee "Tony" Collins, a 17-year-old mother of two children who lived in the apartment across the hall from Mazyck, dropped by Mazyck's apartment while the jewelry was spread on the table. Booth and Reid asked her if she wanted to buy any of it. While Ms. Collins was in the apartment, Eddie Smith, his girlfriend, and another couple stopped by the apartment. Smith paid Reid \$2 so that he and his companions could use the apartment to inject themselves with heroin. Ms. Collins heard Booth and Reid [184] asking "the junkies" for the use of a car so that Booth and Reid could pick up some television sets.

When Ms. Edwards arrived at the Mazyck apartment, Booth explained that he wanted her to drive the car of a friend of his and that he needed someone who had a driver's license in the event the car was stopped by the police.

Late on the evening of May 18 or early in the morning of May 19 all of the adults left the Aisquith Street apartment. Smith

<sup>2</sup> Booth and Jewell Edwards were married June 2, 1983, five days before Booth was arrested.

and his companions went their separate way. Booth and Ms. Edwards, Reid and Ms. Mazyck told Ms. Collins that they were going "[t]o pick up the T.V.'s."

The two couples took a cab to Booth's mother's home. Booth went in the house while the other three remained outside. Booth came out with green plastic trash bags. He then went back into his mother's house and came out with gloves for everyone to wear. The group then went to the rear of the Bronstein home. Before entering, Booth pointed the Bronsteins' car out to Ms. Edwards as the car which she would be driving and handed her the keys to the car. Also before the group entered the Bronstein home, Booth told the women that they should pay "no mind" if they saw any dead bodies.

The two couples entered the house through the rear door and the two women saw the bound and gagged corpses of Mr. and Mrs. Bronstein in the living room. The group looted the house and loaded the loot, including two television sets, into the Bronsteins' car. When someone realized that they had left a trash bag in the house, Booth said not to worry because the police would think that the bag had been left by people who were working on the Bronsteins' lawn that day.

The two couples returned with the loot to the Aisquith Street apartment. Booth and Reid obtained heroin and the couples "fired up" and went to bed, Reid and Ms. Mazyck in the bedroom, while Booth and Ms. Edwards used a sofa bed in the living room. While lying in bed Ms. Edwards asked Booth if the people whom she had seen in the house were [185] actually dead, and Booth replied that they were and that he had killed the man while Reid had killed the woman.

The next morning Ms. Mazyck asked Booth why the elderly couple had been killed, and Booth told her that it was because the elderly couple knew Booth and his nephew.

#### Issues As To Guilt Or Innocence

##### I

During voir dire of prospective jurors Booth had moved to strike one of them for cause and the motion was denied. Booth



argues that the juror had heard that a previous guilty verdict had been overturned and had stated that he would give more weight to the testimony of a police officer than to other witnesses. Error, if any, in denying the challenge was waived and was harmless beyond a reasonable doubt. The venireman in question did not serve as a juror and was not the object of the exercise by the defense of one of its allotted peremptory challenges. The jury was impaneled without Booth's having exhausted all of his peremptory challenges. Immediately prior to the State's calling its first witness defense counsel advised the court that "the Court's jury is acceptable to the defense subject to the previous objections that have been made with regard to the *Witherspoon* matter, and bifurcation." See *Foster v. State*, 304 Md. 439, 450-51, 499 A.2d 1236, 1241-42 (1985) and cases cited therein.

## II

Appellant's second issue reaches back into the period preceding the aborted first trial and asserts that the circuit court erred in denying an oral defense motion that the court order Veronda Mazyck to submit to a psychiatric examination by a particular psychiatrist who had been identified in discovery as an expert witness for Booth. The point is frivolous.

On the afternoon of March 27, 1984, the defense supplemented its answer to the State's motion for discovery and advised that Booth intended to call Dr. John Henderson to [186] explain records of Johns Hopkins Hospital relating to Ms. Mazyck's condition and treatment in April-May 1982. At a pretrial hearing on April 3, 1984, the State orally moved that Judge Murphy preclude the defense from using the hospital records and from having expert testimony based upon them. The prosecutor represented that the records related to psychiatric treatment. He then called Ms. Mazyck as a witness in support of the motion. She testified to her preference that such records be kept secret and said that she had not consented to the release of any such records. The purpose of this testimony was to lay a foundation for a legal argument, to be made on a

later day, that the records represented privileged communications between patient and psychiatrist as recognized in Md. Code (1974, 1984 Repl. Vol.), § 9-109 of the Courts and Judicial Proceedings Article.

Jury selection for the first trial started on April 9, 1984, and continued through April 11. Late in the day of April 11 defense counsel delivered to the State a memorandum in opposition to the State's motion to preclude. Appellant contended that the records showed Ms. Mazyck was diagnosed as an alcoholic and a polydrug abuser, who had experienced auditory and visual hallucinations and memory blackouts. Booth submitted that those conditions affected Ms. Mazyck's credibility and that Dr. Henderson was needed to explain technical matter in the hospital records to the jury.

At argument before Judge Murphy on April 12 the State ultimately took the position that the hospital records could be admitted but only through the particular attending physician whose opinions on medical matters were contained therein. The court ruled that it would permit use of the psychiatric records if the defense brought in the doctor who had made the diagnosis. Defense counsel said that she would certainly try to do that. The court further indicated that if the attending doctor was not available he would allow Dr. Henderson to testify to the meaning of terms in the medical records. After the court had quickly disposed [187] of certain unrelated matters, defense counsel orally moved "that the court order that Veronda Mazyck make herself available for examination by one of our doctors, Dr. Henderson." When the State asked if the defense were questioning Ms. Mazyck's "capacity" to testify as a witness, defense counsel replied that "capacity is a very difficult hurdle to make. Her competency is what the State is talking about, I imagine." At that point Judge Murphy denied the motion, without stating any reason for the ruling.

On the afternoon of Friday, April 13, opening statements were made to the jury and the first witness in the State's case was heard. On the following Monday, April 16, at 10:07 a.m.

counsel for Booth filed a motion, together with an order signed by Judge Murphy, directing the production of the Johns Hopkins Hospital Comprehensive Alcoholism Program records on Ms. Maryck. The motion recited that the evidence of Ms. "Maryck's alcoholism is relevant to her credibility as a witness for the State in this case." That afternoon Ms. Maryck began her direct examination testimony at the first trial. Her direct was resumed on the morning of April 17. Cross-examination, which began that morning and continued well into the afternoon, encompasses seventy pages of transcript. The hospital records were used in the cross-examination and were marked for identification.

At the retrial Ms. Maryck was again examined and cross-examined at length, including cross-examination about the extent and effects of her drug and alcohol abuse.

In his brief on this appeal Booth characterizes the trial court's refusal to order a psychiatric examination of Veronda Maryck as a ruling on a motion for an examination "by a defense doctor on the issue of whether she was competent to testify." At no time, either in connection with the trial or retrial, did appellant move to exclude testimony from Ms. Maryck on the ground that she was incompetent to be a witness. At no time did appellant present any medical [188] opinion, by affidavit or otherwise, that it was likely that Ms. Maryck was incompetent.

"The test of incompetency is whether the witness has 'sufficient understanding to appreciate the nature and obligation of an oath and sufficient capacity to observe and describe correctly the facts in regard to which [the witness] is called to testify.'" [*Evans v. State*, 304 Md. 487, 507, 499 A.2d 1261, 1271 (1985) (quoting from *Johnston v. Frederick*, 140 Md. 272, 281-82, 117 A. 768, 771 (1922)).]

While Judge Murphy did not state for the record his reason for denying appellant's oral motion of April 12, 1984, the court could have viewed the request as an attempt to lay a foundation for Dr. Henderson to express opinions which Booth would then argue were relevant to credibility, as opposed to competency.

Were that the basis of the ruling, there would be no abuse of discretion. A trial judge has discretion to determine whether opinion evidence of questionable relevance will be sufficiently helpful to the jury. See *Stebbing v. State*, 299 Md. 331, 350, 473 A.2d 903, 912, cert. denied, \_\_\_\_ U.S. \_\_\_\_, 105 S.Ct. 276, 83 L.Ed.2d 212 (1984).

If, however, we consider that appellant's oral motion was, as appellant now contends, a motion directed to Ms. Maryck's competency to testify, Judge Murphy had already observed her when she testified briefly on April 3, 1984. That personal observation, coupled with the lack of any objection to competency at that time, would furnish an appropriate basis for the court's ruling.

In any event, when "determining whether a request for a mental examination should be granted, . . . a trial judge should carefully balance the demonstrated necessity for a compelled examination against the existence of important countervailing considerations." *Evans*, 304 Md. at 508, 499 A.2d at 1272. Here the appellant possessed copies of the hospital records of Ms. Maryck's psychiatric treatment by the time she testified at the first trial, if not earlier. But [189] for the ambiguous and somewhat off-handed oral motion of April 12, 1984, appellant's position in the trial court was that the records were relevant to credibility. Ms. Maryck testified at length at two trials without her demeanor causing either the court or counsel to question her competence. Under these circumstances appellant has failed to show that there was any abuse of discretion in the denial of the oral motion.

### III

This issue concerns an alleged error in the admission of evidence during the direct examination by the State of Eddie Smith. Smith testified that he had injected himself with heroin in Maryck's bathroom in the presence of Reid with whom Smith had had a conversation. The State then questioned Smith as follows:



Q: After you left the bathroom—

A: Right.

Q: —what, if anything did you say to this defendant [Booth], and use the exact words as best you can remember?

A: I asked Ace what was Sweetsie talking about, he said—

[DEFENSE COUNSEL: Objection.

THE COURT: Overruled.

Q: [STATE'S ATTORNEY]: You may answer.

A: He [Reid] said he had just killed a couple mother fuckers.

Q: Did Ace respond to what you said?

A: Yes, he did.

Q: What, if anything, did he say?

A: He [Booth] said he [Reid] was just exaggerating, you know, talking something, *he* didn't know what he was talking about. [Italics added.<sup>3</sup>]

[190] A colloquy at the bench which had followed objection to an earlier form of the same question developed the basis for the objection to be hearsay. Booth briefs this evidence point alternatively. He says that if the ruling was based on the theory that Reid and Booth were co-conspirators in a conspiracy to rob, Reid's statement to Smith was not admissible against Booth because any conspiracy to rob had terminated. Booth further contends that Reid's statement cannot be admissible as part of an admission against interest made by Booth because, when told of Reid's statement, Booth's response "adds up to a clear-cut denial." *McCormick on Evidence* § 270 (E. Cleary 3d ed. 1984).

There was no error. Booth's response that Reid was exaggerating and did not know what he was talking about was an

<sup>3</sup> The nearest antecedent to the italicized "he" indicates it refers to Reid.

admission by Booth. Smith's conversation with Booth took place while Reid and Booth anticipated returning to the Bronsteins' home in order to steal more property, but before they had left Aisquith Street to go to the Bronsteins' for the second time. Under all of the evidence the jury could consider Booth's statement as an effort to minimize and cover up Reid's incriminating statement to Smith so that Smith would not, even inadvertently, upset the joint plan of Reid and Booth to return to the murder scene with a licensed driver.

#### IV

This assignment of error is directed at an instruction to the jury concerning premeditation. The court defined premeditation in its charge and no exception was taken to that definition.<sup>4</sup> The court told the jury in Booth's case "that you may consider the multiple injuries and their intensity suffered by the victim as providing adequate evidence of premeditation." Booth challenges the latter instruction. Citing *People v. Anderson*, 70 Cal.2d 15, 447 P.2d 942, 73 Cal.Rptr. 550 (1968); *People v. Hoffmeister*, 394 Mich. 155, 229 N.W.2d 305 (1975); and *Austin v. United States*, 382 F.2d 129 (D.C.Cir.1967), he contends that "the number of injuries cannot, *alone*, constitute proof of this element." (Emphasis in original).

We initially note that the challenged instruction merely told the jury that it "may consider" the multiple wounds as adequate evidence of premeditation, but the instruction did not limit a jury's consideration of all of the evidence when applying the definition of premeditation.

Further, the proposition which appellant distills from the cases cited by him is contrary to Maryland law. The intervals between the stab wounds inflicted on Mr. Bronstein evidence

<sup>4</sup> Recently, in *Ferrell v. State*, 304 Md. 679, 684, 500 A.2d 1050, 1052-53 (1985), we repeated the definition of premeditation drawn from *Chisley v. State*, 202 Md. 87, 106, 95 A.2d 577, 585-86 (1963) as "some appreciable period of time during which [the accused], after having formed 'a specific purpose and design to kill' had 'full and conscious knowledge of the purpose to do so.'"



sufficient time for reflection and decision. See *Ferrell v. State*, 304 Md. 679, 684, 500 A.2d 1050, 1052-53 (1985); *Colvin v. State*, 299 Md. 88, 109, 472 A.2d 953, 963-64 (1984); *Hyde v. State*, 228 Md. 209, 216-17, 179 A.2d 421, 424-25 (1962); *Cummings v. State*, 223 Md. 606, 611-12, 165 A.2d 886, 888-89 (1960); *Kier v. State*, 216 Md. 513, 522-23, 140 A.2d 896, 900 (1958); and *Chisley v. State*, 202 Md. 87, 106-09, 95 A.2d 577, 585-87 (1953).

Finally, the evidence of premeditation in the instant case is not limited to the multiple wounds. Mr. Bronstein was stabbed when his hands were tied behind his back, and Booth admitted to Ms. Mazyck that the people were killed because they knew Booth and his nephew.

## V

Booth contends that the evidence was legally insufficient to support his conviction for conspiracy to rob. The principle which appellant says applies here is that there must be, in addition to evidence of the commission of a robbery, evidence that a meeting of minds occurred prior to the commencement of the robbery. Here no witness testified to what transpired between Booth and Reid prior to, or [192] at the time of, the first entry into the Bronsteins' home in the late afternoon or early evening of May 18, 1983.

Booth's argument is fully answered by the statement of facts which opens this opinion. The direct evidence is that by 9:00 p.m. on the day of the murders Booth and Reid were at Ms. Mazyck's apartment with loot from the Bronsteins' home and that they planned to return there with a licensed driver in order to use the Bronsteins' car to haul away more loot. This evidence supports the reasonable inference that Booth and Reid were acting in concert during the initial entry when the robberies of Mr. and Mrs. Bronstein occurred. From the standpoint of conspiracy to rob it is immaterial whether the robberies committed during the first entry are viewed as fully consummated crimes or merely as the earlier phase of con-

tinuing robberies which concluded when Booth *et al.* returned to the Bronsteins' home later that night.

Another inference, theoretically consistent with the direct evidence, would be that Booth and Reid met coincidentally at the Bronsteins' home at the time of the earlier entry and commenced separate robberies acting independently of each other. That alternative is absurd.

## VI

During jury selection appellant objected to the disqualification of potential jurors who expressed opposition to the death penalty. He also expressly requested that two juries be impaneled, one to determine guilt or innocence which would include opponents of the death penalty, and another to determine sentence if that were to become necessary. There was no error in excluding prospective jurors opposed to capital punishment or in refusing to impanel separate juries. The arguments advanced by Booth here were fully considered and rejected on the merits in part I B of our recent opinion in *Foster v. State*, 304 Md. 439, 453-66, 499 A.2d 1236, 1243-51 (1985).

[193] In its instructions to the jury at the guilt or innocence phase the trial court had included the following paragraph.

The general rule is that there is an inference of guilt which arises from the possession of recently stolen property. Upon proof of the corpus delicti, the inference is strong enough to establish the criminal agency of the possessor of such goods and thus to sustain the conviction. If a robbery with a dangerous and deadly weapon is proved to have been recently committed, the inference is that the possessor of goods taken during its commission was the robber.

Booth submits that by saying "the inference is" the trial court improperly converted an inference into a presumption because only presumptions can be stated as existing whereas inferences exist only if and when the trier of fact has chosen to find them.

This point has not been preserved for appellate review. Maryland Rule 4-325(e) provides that "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record . . . stating distinctly the matter to which the party objects and the grounds of the objection." In the instant case the trial judge prepared his instructions in writing and gave counsel the opportunity to review and to take exceptions to them in advance of his reading them to the jury. Booth did not except to that portion of the charge of which he now complains.

Furthermore, were the matter properly before us, we would hold that there was no prejudicial error in light of the charge as a whole. The trial judge instructed the jury generally on inferences in a portion of his charge which preceded, and which was separated by only two paragraphs from, the paragraph in which Booth now claims error lies. The general charge read:

There are two types of evidence which the jury may consider in this case, direct or circumstantial evidence. [194] Direct evidence is the evidence that is attributable to actual knowledge of a fact such as an eyewitness. Circumstantial evidence is that which proves the facts indirectly or facts and circumstances from which an inference may arise. The law makes no distinction between direct and circumstantial evidence. No greater degree of certainty is required of circumstantial evidence than direct evidence since in either event you must be convinced of the defendant's guilt beyond a reasonable doubt.

You are further instructed that in a criminal case the defendant is entitled to every inference which can reasonably be drawn from the evidence and where two inferences can be drawn from the same evidence, one consistent with guilt and one consistent with innocence, the defendant is entitled to the inference which is consistent with his innocence.

#### Issues Relating To Sentencing

#### VIII, IX and X

Appellant's eighth, ninth, and tenth contentions will be considered together because they involve the exercise by Booth of

the right of allocution in capital cases conferred by Maryland Rule 4-343. Subsection (d) provides: "Allocution.—Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement."

After Booth had been found by the jury to be guilty of Mr. Bronstein's murder, that same jury sat to determine whether his sentence should be life imprisonment or death. The State's case at the sentencing phase consisted entirely of the pre-sentence investigation report and the victim impact statement. After nonparty witnesses for the defense had testified, Booth and his counsel approached the bench. Counsel repeated on the record advice previously given Booth concerning his right to testify. Counsel told Booth that if he decided not to testify he still had "the right to allocute," which was explained as "the right to tell the jury [195] why you feel they should not execute you." Counsel said that the court would instruct the jury that Booth's failure to testify could not be held against him, but when counsel asked the court to confirm the legal accuracy of that statement the judge replied: "No, I don't believe that's accurate. That only held true for the guilt or innocence phase of this trial." The court said it was "directly up to Mr. Booth whether he wants to testify or not at this point. Nothing will be said to the jury about that." After further discussion the court agreed with Booth's request that he be allowed to consider the matter overnight and advise of his decision the following morning.

The next morning Booth said that he would not testify but that he would allocute. At the court's request Booth explained the difference in his own words.

Well, if I testify, I would be subject to cross-examination by the counsel for the State and if I allocute, I can't be cross-examined—well, I won't be cross-examined.

THE COURT: All right. Do[—]you will make an argument to the jury concerning whatever you want to say to the jury; is that correct?



THE DEFENDANT: Yes, sir.

THE COURT: All right. You understand that you will not be under oath and you will not be examined by anyone as to what you say to the jury?

THE DEFENDANT: Yes sir.

The jury was then brought into the courtroom and told by the judge that "the defendant has the right to address you and say whatever it is he wishes to say to you concerning the matters that you are going to be deliberating on." Booth, who had elected not to testify at the guilt or innocence phase, opened his statement to the jury by saying that "I finally get a chance to say something to you." In his address, which transcribes to seven and one-half pages, Booth denied killing anyone. He admitted only to having entered the Bronstein home late in the evening, after the murders had been committed, in order to steal. He at [196]tacked the prosecutors for fabricating statements of witnesses and putting words in their mouths. He said his general occupation was being a thief but he was not a robber or murderer.

In its summation the State told the jury, over objections by defense counsel, that Booth's statement was not evidence, that Booth, in order to avoid cross-examination, had not taken the witness stand, and that Booth had lied to the jury and should not be believed.<sup>5</sup>

<sup>5</sup> The relevant portion of the State's argument reads:

[N]othing that John Booth said to you this morning is evidence.

[DEFENSE COUNSEL]: Objection, your honor.

THE COURT: Overruled.

[STATE'S ATTORNEY]: Remember what the Judge told you, I believe in his very first statement to you, evidence is three things. It is stipulations, that which counsel agrees to be fact, it is documents or pictures or actual objects placed into evidence and it is testimony under oath subject to cross-examination from the witness chair. What you heard this morning was John Booth in his right of allocution. Something different than testimony. For the law provides that any man before he is sentenced can say anything that is on his mind. But anything that is on

[197] In his brief to us Booth argues that the trial court erred (a) in allowing the State to argue that Booth's "allocution was not evidence to be considered by the jury," (b) "in permitting the prosecutor to comment on appellant's failure to testify at his capital sentencing proceeding," and (c) "in refusing to instruct the jury that it could not draw any inference adverse to appellant from his failure to testify during the sentencing proceeding." Before we can address these specific assignments of error, we must explore the nature of the "allocution" here involved.

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his mind is not an elevated level of evidence.

[DEFENSE COUNSEL]: Objection, your Honor.

THE COURT: Overruled.

[STATE'S ATTORNEY]: There is but one reason John Booth did not take the witness stand and present his story as he told it to you in allocution. I'm not so naive a man to believe Mr. Booth would be so moved by the prospect of an oath that he would not break his oath. But ladies and gentlemen, he stood here and testified, not under oath, for one reason only to avoid cross-examination.

[DEFENSE COUNSEL]: Objection, your Honor.

THE COURT: Overruled.

[STATE'S ATTORNEY]: I assure you we had some questions for Mr. Booth. I ask you, don't be conned by this con man, don't be conned by this man who travels with fifteen names, don't be conned by a most accomplished liar.

But, even though, we had no cross-examination, even though we couldn't ask the man one question—

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[STATE'S ATTORNEY]: —the lies shined through his statement. He just wasn't, for all his talents, a con man. He just wasn't that good a liar. Do you realize what he has actually said to you?

The prosecutor then argued from the content of Booth's statement that Booth had contradicted himself on each of two aspects of the allocution. Continuing, counsel for the State said:

Ladies and gentlemen, he could have said anything that he wanted when he stood here before you. Anything. The one thing he did not say is this, I am sorry for what I have done. For I submit, he is not and in the final analysis, with his life on the line, not subject to cross-examination—

[DEFENSE COUNSEL]: Objection, your Honor.

THE COURT: Overruled.

[STATE'S ATTORNEY]: —He has attempted once again to lie his way out of his problems. Please, please do not be so naive as to let him do that.



After January 1, 1979, and prior to the revision of the Maryland Rules effective July 1, 1984, there was no rule applicable to allocution in capital cases. There was, however, an allocution rule applicable to noncapital cases, former Rule 772 d. At the Rules Committee meeting of October 15/16, 1982, a member proposed that the allocution rule apply to capital cases as well. Minutes of the committee reflect that certain benefits of such a change were discussed. These were the opportunity for the defendant "to make a statement in favor of imposition of a sentence of life imprisonment as opposed to death" and that, because in a court sentencing in a capital case a judge would likely never refuse a request by the defendant to make a statement, the absence of a provision for allocution before a jury in capital cases might raise constitutional questions. As burdens to be anticipated from the proposal one member pointed to the existing complexity of capital cases while the [198] chief of the Criminal Division of the Attorney General's Office anticipated concerns in State's Attorneys' offices "about unsworn statements being made by the defendant immediately prior to the jury's retiring to consider its verdict." The Rules Committee then voted to recommend to this Court that the rule applicable to noncapital cases be amended as follows (brackets indicate matter to be deleted and italics indicate matter to be added to the text of former Rule 772 d, then tentatively renumbered Rule 4-703(d) in the Committee's working draft for the rules revision project):

Before imposing sentence, the court shall [inform] *afford* the defendant [that he has the right] *the opportunity*, personally and through counsel, to make a statement and to present information in mitigation of punishment[, and the court shall afford an opportunity to exercise the right].

That recommendation is now Rule 4-342(d).

The Committee also decided to make the amended allocution rule applicable to capital cases, with the further deletion of the provision for presentation of information in mitigation of punishment. That recommendation is now Rule 4-343(d).

The obvious purpose of Rule 4-343(d) is to afford the death penalty eligible, convicted murderer the opportunity to make an unsworn statement in mitigation of the death penalty without being subject to cross-examination. In this respect the statement is similar to closing argument, but it is not completely analogous to closing argument because the factual content of the allocution is not limited, in general, to the record in the case, inferences therefrom, and matters of common human experience. In the allocution is unsworn and is not subject to cross-examination, it is not testimony in the conventional sense. Nevertheless, allocution may be considered by the sentencing authority. Under Md. Code (1957, 1982 Repl. Vol., 1985 Cum. Supp.), Art. 27, § 413(g)(8) the sentencing authority may find by the preponderance test "[a]ny other facts which the [sentencing au[199]thority] specifically sets forth in writing that it finds as mitigating circumstances in the case."<sup>6</sup> In *Booth's* case, after the jury had found the aggravating circumstance of murder in the course of robbery, the jury was free to find as a mitigating circumstance such aspect of the content of Booth's allocution on which the jury could unanimously agree, simply by specifically setting it forth on the sentencing form. Further, if the jury found any such mitigating circumstance in the allocution the jury was obliged to weigh that mitigating factor in determining whether the sentence should be life or death.

Within the bounds of permissible jury argument the prosecutor's summation honored the principles discussed above. Counsel for the State contrasted Booth's allocution with the elevated level of evidence which is sworn testimony subject to cross-examination. The record does not factually support Booth's contention that the prosecutor told the jury that it could not consider Booth's allocution. Indeed, the entire thrust of the argument objected to by Booth was a recognition by the State that the jury *could* consider the content of Booth's statement to be true, but that the jury *should* not.

<sup>6</sup> All statutory references, unless otherwise noted, will be to Art. 27.

Among the reasons given by the State why the jury should reject as false the content of Booth's allocution was that it was unsworn and was not subject to cross-examination. Because the content of a convicted defendant's allocution may be considered by the jury or court in mitigation, the State, as a matter of nonconstitutional Maryland law, may comment on that allocution and urge its rejection by arguments which may include attacking the defendant's credibility by explicit reference to the lack of an oath and to the lack of testing by cross-examination.

Booth further submits that such comment violates his Fifth Amendment protection against compulsory self-incrimination because it is also a comment on Booth's failure to testify at the sentencing proceeding.

Appellant's argument assumes as its major premise the applicability here of the rule in *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). After *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) had held that the Fifth Amendment prohibition against compulsory self-incrimination was applicable to the states through the due process clause of the Fourteenth Amendment, *Griffin* held that references by a California court and prosecutor to Griffin's failure to testify violated the United States Constitution. The case was a two-stage death penalty trial. Griffin had not testified at the guilt or innocence stage. The court had instructed the jury that it could take into consideration on the issue of guilt Griffin's failure to deny or explain evidence which he would reasonably be expected to deny or explain because of facts within his knowledge. In argument the prosecutor had enumerated aspects of the case which the defendant had not seen fit to explain or deny by taking the stand. Such comment on the refusal to testify was held to be "a penalty imposed by courts for exercising a constitutional privilege [which] cuts down on the privilege by making its assertions costly." *Id.* at 614, 85 S.Ct. at 1232-33, 14 L.Ed.2d at 109-10.

The right is also infringed where the government elicits on cross-examination of the defendant at a second retrial that the

defendant had not testified at the prior trials. See *Stewart v. United States*, 366 U.S. 1, 81 S.Ct. 941, 6 L.Ed.2d 84 (1961). Nor is a procedure constitutionally permissible which requires the defendant to testify as the first witness in the defense case or not at all. *Brooks v. Tennessee*, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972). In *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), the Court held that a defendant who had not testified was entitled, upon request, to an instruction that his election not to testify could not be used [201] as an inference of guilt and should not prejudice him in any way. The Court reasoned that

[j]ust as adverse comment on a defendant's silence "cuts down on the privilege by making its assertion costly," [*Griffin*, 380 U.S.] at 614 [85 S.Ct. at 1232], the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege. [450 U.S. at 305, 101 S.Ct. at 1121, 67 L.Ed.2d at 254.]

Even though such an instruction calls attention to the failure of the defendant to testify there is no Fifth Amendment violation in a court's giving the instruction without request because the instruction is not adverse to the defendant and "cannot provide the pressure on a defendant found impermissible in *Griffin*." *Lakeside v. Oregon*, 435 U.S. 333, 339, 98 S.Ct. 1091, 1095, 55 L.Ed.2d 319, 325 (1978).

It has also been determined that at least certain aspects of the privilege against compulsory self-incrimination apply to one who invokes the privilege after that person has been found guilty and before sentencing. We have held that one who had plead guilty but who had not yet been sentenced could not be compelled to be a witness at the trial of a co-defendant on the same charges. *Smith v. State*, 283 Md. 187, 388 A.2d 539 (1978), cert. denied, 439 U.S. 1130, 99 S.Ct. 1050, 59 L.Ed.2d 92 (1979). The Supreme Court has also addressed an aspect of the Fifth Amendment right arising out of the sentencing phase of a two-phase capital murder trial in Texas. Texas law requires



finding future dangerousness, *inter alia*, before imposing a death penalty. In *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), the accused, while confined in jail on the murder charge, had submitted to a pretrial psychiatric examination informally ordered by the trial judge to determine the accused's capacity to stand trial. The psychiatrist did not give any *Miranda* warnings. The state used the defendant's statements against him in the sentencing proceedings. This was held to violate the *Miranda* rule. Answering [202] contentions that incrimination was complete once guilt had been adjudicated and that the Fifth Amendment privilege had no relevancy to the penalty phase of a capital murder trial, the Court said:

We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees. Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment. Yet the State's attempt to establish respondent's future dangerousness by relying on the unwarned statements he made to [the psychiatrist] similarly infringes Fifth Amendment values. [451 U.S. at 462-63, 101 S.Ct. at 1873, 68 L.Ed. 2d at 369 (footnotes and citations omitted).]

In the case before us Booth combines the *Griffin* prohibition against adverse commentary on silence and the *Estelle* recognition that there can be self-incrimination after a finding of guilty to urge that the prosecutor's jury argument at his sentencing violated his Fifth Amendment rights. Booth's contention ignores the fact that he did not remain silent and that the prosecutor's comments were directed at Booth's allocution. When more bluntly stated Booth's argument is that the law must pretend that he remained silent because MD.R. 4-343(d) benefited him by allowing him to make for the jury's consideration a statement which was unsworn and not subject to cross-

examination. We will not construe this state's prohibition against self-incrimination to incorporate such a fiction.<sup>7</sup>

[203] The remaining question is whether the prohibition against compulsory self-incrimination in the Fifth Amendment to the United States Constitution, as applicable to Maryland through the Fourteenth Amendment, imposes a contrary rule. We assume that, if Booth had neither testified nor allocuted at the sentencing phase, the *Griffin* rule would continue to apply. Further, if Booth had testified under oath and subject to cross-examination at his sentencing he would have waived the Fifth Amendment privilege. *Cf. Caminetti v. United States*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917) (testimony by accused at unitary trial is a waiver). Allocution under Rule 4-343(d) falls between the two. Booth's allocution is more like testimony than silence and for Fifth Amendment purposes is testimonial, carrying with it, at a minimum, a waiver of any privilege to avoid comment by the prosecutor on the allocution.

Although the Supreme Court seems not directly to have addressed this problem, considerable light is cast on it by a capital case from Ohio reported with *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), *vacated on other grounds*, 408 U.S. 941, 92 S.Ct. 2873, 33 L.Ed.2d 765 (1972).<sup>8</sup> Under the then Ohio procedure the decision on guilt or innocence and, if guilty, the jury role in sentencing were accomplished in one proceeding. Unless the jury, when returning a verdict of guilty of murder, also recommended mercy, a death

<sup>7</sup> Article 22 of the Maryland Declaration of Rights provides "[t]hat no man ought to be compelled to give evidence against himself in a criminal case."

Md. Code (1974, 1984 Repl. Vol.), § 9-107 of the Courts and Judicial Proceedings Article provides:

A person may not be compelled to testify in violation of his privilege against self-incrimination. The failure of a defendant to testify in a criminal proceeding on this basis does not create any presumption against him.

<sup>8</sup> The judgement of the Supreme Court of Ohio was vacated insofar as it left the death penalty undisturbed. The case was remanded for further proceedings in light of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).



sentence was automatic. The defendant contended that this procedure placed unconstitutional pressure on him to testify because, if he remained silent with respect to guilt or innocence, as he had done, he suffered imposition of the death penalty without the jury [204] ever having heard him speak in mitigation of that punishment. The Court did "not think that Ohio was required to provide an opportunity for petitioner to speak to the jury free from any adverse consequences on the issue of guilt." 402 U.S. at 220, 91 S.Ct. at 1474, 28 L.Ed.2d at 734. *A fortiori*, Maryland is not required, when it provides an opportunity for the person found guilty of capital murder to speak to the jury in mitigation of sentence, to make that allocution free from any adverse consequences on the issue of sentence. Having the State argue that allocution is unsworn, not subject to cross-examination, not evidence, and not to be believed is not as adverse as the procedure which passed constitutional muster in *McGautha*.

The issue now before us was presented in a highly analagous format in *Jones v. State*, 381 So.2d 983 (Miss.), *cert. denied*, 449 U.S. 1003, 101 S.Ct. 543, 66 L.Ed.2d 300 (1980). The Mississippi constitution guarantees an accused the right to argue his case to the jury. *Jones* was a two-stage capital murder prosecution. The defendant had not testified on guilt or innocence but elected to argue at the sentencing phase. In his "argument" he told the jury, as facts, matters which were not in evidence. The prosecutor objected on grounds, apparently expressed in the presence of the jury, which included the following:

That's testifying and there's no way to contradict that and it's not fair, Judge, if he doesn't take the stand and let the State cross examine him on this but to stand up here and to be able to do something that the State does not have a right to cross examine him on is not proper. . . . The State didn't have a right to call him, Judge. We couldn't put him on the stand. [381 So.2d at 998.]

The Supreme Court of Mississippi ruled that the state constitutional right to argue and the rights of the accused under *Griffin*

create a conflict which requires a defendant to make a choice. If he chooses to argue his case to the jury and at the same time invokes the Fifth Amendment, he must confine his remarks to the evidence in the record. The [205] Fifth Amendment privilege against self-incrimination is a shield, not a sword. A criminal defendant who takes advantage of his right to argue his case to the jury must not be permitted to say all the things he might have testified to had he chosen to call himself as a witness. When he does so, he will be deemed to have waived the right not to have his failure to take the stand commented upon. [381 So.2d at 993.]

And further:

The practical solution to the dilemma presented by the accused who uses his constitutional right to argue his case to the jury to give, what is for all practical purposes, testimony is to treat the unsworn testimonial statements of the accused which were not supported by the record as a partial waiver of the privilege against self-incrimination. It is not a total waiver of the privilege, since the prosecution is unable to cross-examine the accused at this late stage of the trial. But the prosecution may comment to the jury that the defendant's statements were not given under oath and that he was not subject to cross-examination about them. [*Id.*]

*Williams v. State*, 445 So.2d 798 (Miss.1984), *cert. denied*, \_\_\_ U.S. \_\_\_, 105 S.Ct. 803, 83 L.Ed.2d 795 (1985) held that, unlike *Jones*, *supra*, there was no waiver where the defendant's opening statement at a capital sentencing hearing asserted self-defense which was already in evidence, albeit not in detail, *via* admissions related by police witnesses.

At the trial resulting in the conviction attacked in *State v. Bontempo*, 170 N.J.Super. 220, 406 A.2d 203 (1979), a post-conviction case, the presiding judge had departed from applicable procedure and allowed the accused who had not testified to make an unsworn statement to the jury in addition to the argument by counsel for the accused. In rebuttal the prosecutor emphasized to the jury that the defendant's statement was not under oath, was not subject to cross-examina-

tion, and had omitted explaining aspects of [206] the evidence against him. To support post-conviction relief Bontempo relied heavily upon *Griffin*. After reviewing many of the cases cited *infra*, the New Jersey court summed up by saying that

the rationale underlying the decisions cited compels the conclusion that defendant's testimonial behavior before the jury justified the prosecutor's rebuttal. Where, as here, a defendant's unsworn statements take on a "testimonial" color, the jury might well be misled. The accused thereby "gather[s] an advantage that is false, for less than the whole truth may affirmatively mislead." *State v. Fioravanti*, [46 N.J. 109, 118, 215 A.2d 16, 21 (1965), *cert. denied*, 384 U.S. 919, 86 S.Ct. 1365, 16 L.Ed.2d 440 (1966)]. Thus, a defendant who "undertakes to answer part of the evidence against him [in a testimonial manner] is subject to comment as to factual thrusts he does not meet." *Id.* at 117, 215 A.2d at 20. Here, the prosecutor's comments constituted proper rebuttal and did not serve to violate defendant's Fifth Amendment rights. [170 N.J.Super. at 244-45, 406 A.2d at 215.]

Subsequently, the United States District Court for the District of New Jersey granted Bontempo the writ of habeas corpus but the Third Circuit reversed. *Bontempo v. Fenton*, 692 F.2d 954 (1982), *cert. denied*, 460 U.S. 1055, 103 S.Ct. 1506, 75 L.Ed.2d 935 (1983). The Third Circuit held:

The circumstances here were unusual. The jury was told that Bontempo's argument could not be considered as evidence and yet he talked about facts which were not in the record. The prosecutor's comments about those unsworn accounts and about Bontempo's failure to mention other relevant events was fair reply to the unorthodox closing argument. The jury's attention had been focused on the facts mentioned in the closing argument, despite the instruction that they were not evidentiary. The prosecutor was not prohibited from recognizing the reality of the situation and answering Bontempo's narrative. We are not persuaded that in so doing the prosecution did [207] comment on Bontempo's failure to testify. Consequently, *Griffin* is not applicable. [*Id.* at 959.]

The problem under consideration has also risen at trials on guilt or innocence where the accused, appearing pro se, gives

unsworn testimony, not subject to cross-examination, in the course of purportedly questioning witnesses or purportedly arguing from the record. For example, in *United States ex rel. Miller v. Follette*, 278 F.Supp. 1003 (E.D.N.Y. 1968), the petitioner for a writ of habeas corpus complained that at his trial, in which the petitioner had acted as his own attorney, the prosecutor had told the jury in summation that he could not comment upon the accused's failure to take the stand but that the jury should listen closely to the court's charge as to what constituted evidence. Using both a waiver and a harmless error analysis, the petitioned court rejected the contention that petitioner's Fifth Amendment rights as defined in *Griffin* had been violated. It said:

The law is presented with a dilemma. On the one hand, permitting defendant to defend himself without benefit of a lawyer's skills and objectivity may lead him to make statements which can be construed as a total waiver of his privilege against self-incrimination, exposing him to being called by the state. On the other, were defendant allowed to give, what is for all practical purposes, testimony without being subject to some check, the jury might be misled. Faced with such undesirable alternatives, the law seeks a middle ground which accommodates the essence of the opposing interests while furnishing maximum protection to all concerned.

Treating the unsworn testimonial statement of the defendant as a partial waiver of the third aspect of the privilege against self-incrimination [i.e., freedom from adverse comment] provides a practical solution. The prosecution can then be permitted to comment that the defendant's statements were not given under oath while he was subject to cross-examination and that they are, therefore, less weighty than sworn testimony. The constitutional privilege of the criminal defendant appearing [208] pro se would appear to be adequately protected were he given a clear and direct warning by the court that such limited comment might follow if he continued to give what amounted to unsworn testimony. [*Id.* at 1007.]

The Second Circuit affirmed on the harmless error ground, 397 F.2d 363 (1968), and certiorari was denied, 393 U.S. 1039, 89 S.Ct. 660, 21 L.Ed.2d 585 (1969).



In that appeal the prisoner, Miller, relied upon an earlier, two-one decision of the Second Circuit in *United States v. Curtiss*, 330 F.2d 278 (1964). *Curtiss* held that the unsworn and outside-of-the-record excuses given by a pro se defendant for his income tax deficiencies did not constitute a waiver of Fifth Amendment protection and that the prosecutor had violated that protection by arguing that government witnesses had been sworn "but the defendant stood down here and he asked a lot of questions." *Id.* at 281 (emphasis omitted). Dissenting in *Curtiss*, Judge Medina observed:

We have come to a pretty pass if, acting as his own lawyer, a defendant in a criminal case can go ahead and say as a lawyer the things he could have testified to in his own defense, and then accuse the prosecutor of violating his Fifth Amendment rights when the prosecutor tells the jury not to believe him, but rather to render their verdict on the testimony given under oath by the witnesses who did testify. [*Id.* at 287.]

When *Miller v. Follette* reached the Second Circuit that court emphasized that Miller himself had referred to his failure to take the stand so that, "[u]nder those circumstances to regard the prosecutor's restrained remark as an error of constitutional proportions would glorify technicality." 397 F.2d at 367. Absent Miller's own reference, the Second Circuit recognized that it "would be faced with the question of whether *Curtiss* should be reconsidered." *Id.*<sup>9</sup>

[209] *Curtiss* represents what is definitely the minority position. Most courts which have considered the question hold that the Fifth Amendment does not prohibit comment by a prosecutor on unsworn statements of fact made by a pro se defendant. See *United States v. Lacob*, 416 F.2d 756 (7th Cir.1969), cert. denied, 396 U.S. 1059, 90 S.Ct. 755, 24 L.Ed.2d 754 (1970); *Redfield v. United States*, 315 F.2d 76 (9th Cir.1963);

<sup>9</sup> In *United States v. Kaufman*, 429 F.2d 240, 246 (1970), the Second Circuit said in dictum that to the extent that some of the pro se defendant's statement "might be construed as testimony he may have waived his right to refuse to testify."

*Smith v. United States*, 234 F.2d 385 (5th Cir.1956); *State v. Schultz*, 46 N.J. 254, 216 A.2d 372, cert. denied, 384 U.S. 918, 86 S.Ct. 1367, 16 L.Ed.2d 439 (1966);<sup>10</sup> *State v. Polk*, 5 Or.App. 605, 485 P.2d 1241 (1971); *State v. Johnson*, 121 Wis.2d 237, 358 N.W.2d 824 (1984) (no violation by comment that pro se defendant's opening statement was not followed up with proof). And see Note, *Criminal Law—Privilege Against Self-Incrimination—Comment on Failure of Accused Appearing Pro Se to Testify*, 38 Temple L.Q. 102 (1964).

We hold that the State's argument did not violate Booth's Fifth Amendment rights.

The third aspect presented here of the right to remain silent is Booth's claim that the trial court erred in rejecting his proposed instruction No. 17. It read in relevant part:

Every citizen charged with a crime has the right to remain silent at trial, including the sentencing hearing. This is because it is the prosecutor's responsibility at a sentencing to prove the citizen guilty of an aggravating circumstance beyond a reasonable doubt. . . . Mr. Booth did not testify in this phase, as was his right. You shall not draw any inference of guilt from this choice. You shall not allow this choice to prejudice him in any way.

If you use his choice not to testify in any manner, you will have violated your oath that you have taken as jurors.

The trial judge had advised counsel that the above instruction, as well as two others requested by Booth, would not be given. In charging the jury the trial judge did not comment at all on the effect, if any, upon the jury's deliberations of Booth's having allocuted but not testified. Defense counsel's sole exception to the charge was based on the court's "failure to give our requested instructions in full, in the way they are written."

Appellant's requested instruction No. 17 "in the way [it was] written" was properly denied. It presupposed that Booth had

<sup>10</sup> This case was on direct appeal when *Griffin v. California* was decided in 1965.



remained silent when Booth had in fact allocuted.<sup>11</sup> To give the instruction in the form requested would have been confusing and an incorrect statement of law under the circumstances here. In his allocution Booth denied having murdered Mr. Bronstein. The jury had just found beyond a reasonable doubt that Booth had murdered Mr. Bronstein with premeditation. The jury could properly consider, from the allocution, that Booth had not remorse and thereby reduce the weight to be given to the mitigating factors which the jury had found did exist.

## XI

Under the heading of his eleventh submission Booth collects three instances in which he claims there was trial court error in some way associated with claimed improper final argument by the prosecutor at the sentencing proceeding. The permissible scope of closing argument is a matter left to the sound discretion of the trial court. The exercise of that discretion will not constitute reversible error unless [211] clearly abused and prejudicial to the accused. See *Thomas v. State*, 301 Md. 294, 316, 483 A.2d 6, 17 (1984).

### A.

The presentence investigation report, introduced as a joint exhibit at the sentencing hearing, referred to Booth's sentence on May 21, 1972, to three years confinement for assault with intent to maim. That sentence was to be served consecutively to a sentence of four years imposed on May 21, 1971, for robbery. The section on Booth's institutional history explained that "[w]hile incarcerated at the Maryland Correctional Institution, Booth stabbed a fellow inmate, resulting in a consecutive three year sentence for Assault with Intent to Maim

<sup>11</sup> Booth relies heavily on *People v. Ramirez*, 98 Ill.2d 439, 75 Ill. Dec 241, 457 N.E.2d 31 (1983) which held that one who had been found guilty of capital murder was entitled to a *Carter v. Kentucky* instruction at the life or death sentencing hearing. In that case, however, the defendant had remained silent at the sentencing hearing.

imposed on 5/21/72." The presentence report also referred to a November 28, 1978, sentence of five years by the Criminal Court of Baltimore for assault with intent to maim. The employment history section of the report advised that

[b]etween his 9/77 release and his 6/78 arrest for Assault with Intent to Maim, the defendant was employed briefly as a painter for on Robert Shrwer. It was this employer whom the defendant assaulted, reportedly prompted by unpaid wages, which led to Booth's five year sentence on 11/28/78. This information was obtained from Booth's 1978 Admission Summary—Institutional file.

In the course of argument the prosecutor said:

Let me explain to you what maim is. It is an ancient crime and the definition of maiming is doing something, hurting somebody in a way in which they would no longer be of service to the king. Maiming means disfiguring somebody, cutting off an ear, gouging out an eye, cutting off a hand. I submit to you, ladies and gentlemen, that short of death, it is the ultimate crime of cruelty.

At that point defense counsel objected, without stating any reasons. The objection was overruled. On this appeal Booth argues that the prosecutor misstated the law and was describing mayhem in his argument.

[212] There was no error. Codified under the "Maiming" subtitle of Md. Code (1957, 1982 Repl. Vol.), Art. 27, "Crimes and Punishment," are §§ 384-386. The convictions of assault with intent to maim referred to in the presentence investigation report were undoubtedly based on violations of § 386 which in relevant part provides that

[i]f any person . . . shall assault or beat any person, with intent to maim, disfigure or disable such person . . . every such offender . . . shall be guilty of a felony. . . .

Section 386, however, does not define "maim." The specific conduct which constitutes the substantive statutory offense of maiming is set forth in § 385 which deals with

the crime of cutting out or disabling the tongue, putting out an eye, slitting the nose, cutting or biting off the nose, ear or lip, or cutting or biting off or disabling any limb or member of any person, of malice aforethought, with intention in so doing to mark or disfigure such person. . . .

An assault with intent to maim is an assault perpetrated with the intent to inflict one or more of the injuries described in § 385. The prosecutor's definition of maiming virtually paralleled the words of the statute. Consequently, if defense counsel's objection was based on a claimed misstatement of law by the prosecutor, there was no error in overruling the objection.

The objection more likely went to the last sentence above quoted from the prosecutor's argument which characterized maiming as the ultimate crime of cruelty, short of death. We see no abuse of discretion. We have said that counsel in argument "may indulge in oratorical conceit or flourish." *Wilhelm v. State*, 272 Md. 404, 413, 326 A.2d 707, 714 (1974).

#### B.

As the final witness at the sentencing phase, counsel for Booth called a Roman Catholic priest, Father Thomas Schindler, an associate professor at St. Mary's Seminary in [213] Baltimore where he teaches Christian ethics. The trial judge had conducted a preliminary hearing, outside of the presence of the jury, to determine whether Father Schindler could testify. He was offered as an expert on making ethical judgments. According to Booth's counsel the expert opinion would be offered on "the morality of this situation, the ethics of Mr. Booth and how that should play into an ethical decision-making scheme." The court ruled that Father Schindler "will be permitted to testify within the confines that [defense counsel] has just outlined."

Before the jury Father Schindler testified in substance that moral decisions are made on two fundamental bases, one philosophical and the other religious. The philosophical basis reasons from a criterion of what is right and wrong to an

application in a particular situation. The religious basis draws on one's religious background and the commitments of one's particular faith. Based on an interview with Booth, on the presentence investigation, and on Booth's social services record, the witness was of the opinion that, while Booth "knows the golden rule, he "basically makes decisions much as a child would." Father Schindler also told the jury that

we have to take a Christian approach to things. In other words, try to understand from a faith commitment as a Christian what has always been underscored is that in order to have full justice, it is always necessary that justice be tempered by or shot through with love and mercy.

On cross-examination the State developed, *inter alia*, that the witness had been contacted to testify after the guilty verdict had been rendered and within the preceding week to ten days, and that the interview with Booth had lasted approximately fifty minutes. The witness had never previously testified in a capital case and had never seen the sentencing form. On cross-examination the witness was also asked the following:

[214] Q. Now, Father, when you were contacted, did you know that the defense had asked each [prospective] juror their religion?

A. No. I did not know that.

Q. You didn't?

A. No. I did not.

There was no objection by trial counsel for Booth to the above questions.

In the course of the State's summation at the sentencing stage, the prosecutor reviewed the evidence, or lack thereof, as to each mitigating factor listed in the capital punishment statute. In connection with the eighth, or open-ended, factor he discussed Father Schindler's testimony. During that phase of its argument the State referred to the questions asked jurors on voir dire about their religion and to a Catholic priest's having

been "recruited" after the guilty verdict. Appellant argues these comments were an improper attack on defense trial counsel. We find no abuse of discretion. The portion of the argument complained of, in the context of the argument as a whole, is part of an attack on Father Schindler's opinion evidence. Set forth in the margin in its entirety is that portion of the State's argument.<sup>12</sup> It was proper argument.

<sup>12</sup> The only evidence that you heard of what would really be considered a mitigating circumstance is the testimony of Father Schindler. Ladies and gentlemen, I think that it was embarrassing enough that we had this rank attack on your sentimentality—

DEFENSE COUNSEL: Objection.

THE COURT: Overruled.

[STATE'S ATTORNEY]: —By the defendant's grandmother. But particularly as a Catholic, I am horribly offended by the testimony—

DEFENSE COUNSEL: Objection.

[STATE'S ATTORNEY]: —of Father Schindler.

THE COURT: Sustain the objection as to counsel's personal feelings.

[STATE'S ATTORNEY]: Ladies and gentlemen, my personal feelings have nothing to do with this. But realize each one of you, as all of the other hundred or so jurors who were considered for this case, was asked a question by the defense attorneys, what is your religion and how serious are your religious convictions.

DEFENSE COUNSEL: Objection.

THE COURT: Overruled.

[STATE'S ATTORNEY]: Then after the defendant is convicted, a Catholic priest is gone out and recruited.

DEFENSE COUNSEL: Objection.

THE COURT: Overruled.

[STATE'S ATTORNEY]: When? When? Last Thursday. He met this man for the first time and spent fifty minutes with him. Now he is capable of coming into this court and telling you how you are to ethically go about making the decision before you—

DEFENSE COUNSEL: Objection.

THE COURT: Overruled.

[STATE'S ATTORNEY]: —How you are going to go about it ethically. The law provides a step-by-step method for you to get where you are supposed to go.

DEFENSE COUNSEL: Objection.

THE COURT: Overruled.

[STATE'S ATTORNEY]: What does he tell us? He tells us really three things. First he tells us that from an ethical point of view, it is in some instances proper to take life. I think we all can understand that. He tells us that the death penalty should be a penalty of last resort. We didn't need an expert to tell us that because each one of us knew that. But what

[215] Booth also complains of the following passage from the State's argument:

[216] If we don't stand together against this crime—

DEFENSE COUNSEL: Objection.

THE COURT: Overruled.

[STATE'S ATTORNEY]: If we don't stand together against this crime that this killer has committed, then as a community and a people, as a civilization, we stand for absolutely nothing because then we are a community that will not protect itself.

Appellant calls this an impermissible "fear tactic" and a suggestion that the jury transfer responsibility for their decision to the community at large. We see it as an argumentative presentation of the deterrence policy in sentencing. There was no abuse of discretion.

## XII

At sentencing Booth called as his witness the Chairman of the Maryland Parole Commission, William Kunkel. He was

is it that he is selling here in this courtroom? He is selling, that is, his expert analysis indicates that this defendant, when he went into the Bronstein home was suffering from an underdeveloped conscience, and underdeveloped moral ethical capacity. Ladies and gentlemen, that is ridiculousness.

DEFENSE COUNSEL: Objection.

THE COURT: Overruled.

[STATE'S ATTORNEY]: That, ladies and gentlemen, is absurd. Certainly, some people may be more moral than others. I guess it's true. I guess he's [Booth's] a classic example of what he studies all the time. It is impossible for an adult human being, capable of speaking intelligently as you saw John Booth, it is impossible for him not to fully appreciate that it is wrong—

DEFENSE COUNSEL: Objection.

THE COURT: Overruled.

[STATE'S ATTORNEY]: —to recruit one of your buddies, one of your dope-addicted buddies to go down and break into your neighbor's home, old people, vulnerable people, available people, to overpower them, to tie them up, gag them, to put a hood over Mr. Bronstein's head and then to take a knife and stab and stab and stab until the knife bends, and a Catholic priest will come in here and say the defendant has an underdeveloped sense of moral capacity that should mitigate his involvement in this crime. It is ridiculous.



asked when Booth would be eligible for parole if a life sentence were to be imposed for the murder of Mr. Bronstein and if maximum sentences were to be imposed, to be served consecutively, for all other crimes of which Booth stood convicted in the subject case.<sup>13</sup> Mr. Kunkel said that under current law Booth would first become eligible in forty-five years, less diminution by credits, *e.g.*, good behavior. This testimony was elicited without objection by the State.

In the course of cross-examination the following transpired:

Q. Can you explain a few other terms to me? What's the term ["work release"] mean?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

Q. Are you familiar with the term?

THE COURT: Just tell us what it means.

A. Yes. I'm familiar with the term ["work release. "]

The State thereafter developed from Mr. Kunkel, without objection, that there is a work release program in the correctional system under which an inmate is allowed to go into the community and work during the hours of employment, returning to the institution when not working. Permission of the Parole Board is not required for work release. Those decisions are made by institutional authorities in the Department of Correction.

Booth argues here that the overruling of his objection was erroneous and requires vacating the death sentence. There was no answer given to the question to which defense counsel objected. The question was reframed. The basis for the objec-

<sup>13</sup> The jury was told that in another case Booth stood convicted of another murder and robbery, committed on Easter Sunday, April 4, 1983. For those crimes Booth had been sentenced to life plus twenty years. Those convictions were on appeal to the Court of Special Appeals at the time for the trial court proceedings in the instant matter. See *Booth v. State*, 62 Md.App. 26, 488 A.2d 196, cert. granted, 303 Md. 297, 493 A.2d 351 (1985).

tion was not stated but it clearly appears that the prosecutor interpreted the objection as going to the competency of Mr. Kunkel to testify as to the meaning of "work release," when that program is not administered by the Maryland Parole Commission. The trial court, on the other hand, seems to have assumed that defense counsel was concerned that the witness would not recognize the question to be preliminary and might launch into a general discussion. When the witness said he was familiar with the term, Booth made no further objections to any part of the entire line of testimony on cross-examination concerning work release. Absent objection error in the admission of evidence is not preserved for a review as of right.

The testimony from Mr. Kunkel about parole, adduced by appellant on direct, and about work release, adduced by the State on cross, was not relevant and should have been excluded if proper objections had been made. In *Poole v. State*, 295 Md. 167, 197, 453 A.2d 1218, 1233 (1983), [218] we said that "[a]ny consideration of the possibility of parole as such simply is irrelevant" in a capital sentencing proceeding. The rationale of *Poole* is applicable to the defense and to the prosecution. We recently so held in *Evans v. State*, 304 Md. 487, 499 A.2d 1261 (1985). There the defense likewise sought to show how far into the future possible parole would be if a life sentence were imposed. The theory of admissibility was that the proffered evidence was relevant to the statutory mitigating circumstance dealing with the unlikelihood of further criminal activity by the defendant that would constitute a continuing threat to society. We said that the trial judge in *Evans* was required to exclude the proffered testimony and pointed out "that one might be likely to engage in criminal activity constituting a threat to those around him whether he is confined in a penal institution or is on parole." *Id.* at 530, 499 A.2d at 1283 (footnote omitted).

In addition to our general duty under § 414(e) in capital cases to consider "any errors properly before [this] Court on appeal," we are also to consider under § 414(e)(1) "[w]hether the sentence of death was imposed under the influence of passion,

prejudice, or any other arbitrary factor." The State's introduction of evidence about work release was not prejudicial in that it did not render the sentencing proceedings unfair. The message which appellant was trying to give the jury through the direct examination of Mr. Kunkel was that Booth would be in his sixties before he could ever be on the streets again, with the inference that by that time his hostility and viciousness should be burned out. Under *Poole* and *Evans*, that evidence was immaterial because persons in the prison community are part of "society" within the meaning of § 413(g)(7). By its cross-examination the State, likewise by eliciting immaterial evidence, sought to correct a possible erroneous impression created by the immaterial testimony on direct, or at least to place that evidence in perspective. The State developed that parole is not the exclusive means by which an inmate can return to the streets so that, by necessary [219] inference, parole does not exclusively control the time of any such return. From the standpoint of substantial fairness, the State's cross-examination was not improper. The technique which the State employed in meeting the improper evidence produced by Booth is generally recognized and is formally known as the doctrine of curative admissibility. The theory underlying that doctrine is explained in 1 J. Wigmore, *Evidence in Trials at Common Law*, § 15, at 750 (Tiller's rev. ed. 1983).

The danger that the doctrine of curative admissibility is designed to meet is the danger that the jury will draw and use inferences with respect to immaterial matters, not that the jury will rely on unreliable evidence with respect to a material matter. If the latter concern were the true basis for the principle of curative admissibility, there would be no satisfactory reason to permit a counterattack with respect to that material matter by the use of normally inadmissible evidence since, by hypothesis, the rebutting evidence (unless excluded for reasons of social policy) also lacks significant probative value and thus cannot—at least not if we believe in the truth-seeking functions of most of the exclusionary rules known as "relevancy rules"—rationally be expected to diminish the prejudice inflicted by the other party's incompetent evidence. Seen from this

perspective, the requirement that the counterattack use evidence similar to that originally received as probably a rough-and-ready way of assuring that the counterattack addresses the immaterial issues raised by the inadmissible evidence originally submitted. [Footnote omitted.]

See also *McCormick on Evidence* § 57 (E. Cleary 3d ed. 1984).

There was no reversible error.

### XIII

Booth submits that the trial court should have instructed the jury, as Booth requested, that it must find the existence of the mitigating circumstance recognized in [220] § 413(g)(6), namely, that "[t]he act of the defendant was not the sole proximate cause of the victim's death." Because Reid is a principal in the second degree to the murder of Mr. Bronstein, Booth says his act is not the sole proximate cause of that death.

This argument was rejected in *Evans*, 304 Md. at 534, 499 A.2d at 1285 where we held that in the context of § 413(g)(6) "the General Assembly intended the words 'proximate cause' to apply only to direct physical causes of the victim's death, and not to acts of a principal in the second degree or an accessory before the fact which aided or abetted the act directly causing death." See also *Huffington v. State*, 304 Md. 559, 574-75, 500 A.2d 272, 279-80 (1985).

### XIV

The trial court furnished to the jury a verdict sheet in the form set forth in Maryland Rule 4-343(e). It listed the seven "statutory" mitigating factors enumerated in § 413(g)(1)-(7) and set forth the open-ended provision of § 413(g)(8) under which the jury could specifically set forth any other facts which it found to be mitigating circumstances and which we shall call "nonstatutory" mitigating circumstances. Booth had asked the trial judge to use a verdict sheet prepared by the defense which listed, in addition to the seven statutory mitigating circumstances, six specific nonstatutory factors which Booth consid-



ered had been raised by the evidence. The defense-proffered verdict sheet also allowed for open-ended findings of other mitigating circumstances. The trial judge did not use the defense form of verdict sheet. Appellant now argues "that the trial judge, by limiting the verdict sheet, deprived Appellant of his constitutional right to have the sentencer make an informed decision on whether the death penalty should be imposed based on the use of *all* pertinent data before it." (Emphasis in original).

[221] The argument has no merit because the verdict sheet actually used did not limit the jury. The trial judge made this plain in his instructions on nonstatutory mitigating factors. Judge Angeletti told the jury that it could consider under Item 8 in the section devoted to mitigating circumstances on the verdict sheet given to the jury

any fact or facts that the defendant claims or proposes as a mitigating circumstance or any fact or facts that any member of the jury proposes that could be a potential mitigating circumstance. . . . If all twelve members of the jury unanimously find that any or all of the proposed facts or mitigating circumstances, either proposed by the defendant or by the members of the jury, have been proven by a preponderance of the evidence, you list them under number eight and consider them. . . .

Booth did not have a right to require a written submission on the verdict sheet of the factors which he claimed existed and operated in mitigation. Indeed, the jury obviously understood that it was not limited to considering whether the statutory mitigating circumstances existed because the jury found nonstatutory mitigating circumstances, *i.e.*, "A. Family Environment," which was particularized as "1. Child Neglect" and "2. Lack of Strong Father Image."

We note that MD.R. 4-343(e) provides that "[t]he findings and determinations shall be made in writing in the following form," but we need not decide in the instant case whether the rule prohibits listing proposed nonstatutory factors for the jury's consideration. In any capital murder case a jury is to

consider whether the statutory mitigating factors exist, and if one is found to exist, it is a mitigating circumstance as a matter of law. With respect to nonstatutory factors the jury must find both that the circumstance exists and that it is mitigating. See *Foster*, 304 Md. at 482, 499 A.2d at 1258. In *Foster* the trial court had included proposed nonstatutory factors on the verdict sheet for the jury's consideration and had correctly instructed the jury on the difference between statutory and nonstatutory factors. A danger which we foresee in attempting to list possible [222] mitigating factors is that a trial court could be drawn into ruling that there is no basis for submitting a proposed factor and the court may thereby generate a meritorious issue as to whether the jury had indeed been improperly limited.

#### XV, XVI and XVII

The three issues now under consideration all relate to the victim impact statement introduced as joint exhibit two at the sentencing hearing. Md.Code (1957, 1982 Repl.Vol., 1985 Cum.Supp.), Art. 41, § 124 requires in certain cases, including capital cases, the preparation and consideration of victim impact statements.

The statute was amended by Acts of 1983, Chs. 297 and 345, effective July 1, 1983. Because the subject murders were committed before July 1, 1983, Booth contends that application of the amended victim impact statement statute to him is a prohibited *ex post facto* application. This argument was rejected in *Grandison v. State*, 305 Md. 685, 506 A.2d 580 (1986). And see *Dobbert v. Florida*, 432 U.S. 282, 293, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344, 356 (1977).

Appellant also submits that Art. 41, § 124 is unconstitutional and that the introduction of victim impact evidence violates the Eighth and Fourteenth Amendments. The argument common to both of these submissions is that victim impact evidence injects an arbitrary factor into a capital sentencing proceeding. We considered and rejected this argument in *Lodowski v.*



*State*, 302 Md. 691, 735-42, 490 A.2d 1228, 1251-54 (1985), *vacated on other grounds*, — U.S. —, 106 S.Ct. 1452, 89 L.Ed.2d 711 (1986). The analysis in *Lodowski* was “considered” *dicta*, intended for the guidance of trial courts and the bar. We apply that analysis in support of our holding here.

Booth further argues that the *Lodowski* analysis rested the relevancy of victim impact information to capital sentencing exclusively on the legislative determination implicit in enacting the statute and that *Lodowski* failed to [223] consider what Booth calls the constitutional aspects. Certainly a primary purpose of the General Assembly in enacting a requirement for victim impact information was to insure that some consideration would be given to the victims of certain types of crimes when the perpetrator was sentenced, lest the emphasis on the perpetrator as an individual be so great as to exclude consideration of the victim. In capital cases the victims include survivors of the murdered individual.

There is no *per se* constitutional defect in using a victim impact statement at a capital sentencing proceeding. The sentencing authority is not constitutionally restricted to considering only the operative facts in the commission of the crime, in addition to the circumstances of the perpetrator. This Court, speaking through Judge Cole in *Trimble v. State*, 300 Md. 387, 425, 478 A.2d 1143, 1155 (1984), explained the purposes behind the death penalty.

“The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.

“In part, capital punishment is an expression of society’s moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.” [quoting *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 2929-30, 49 L.Ed.2d 859, 880 (1976) (opinion announcing judgment) (footnotes omitted).]

We have also reviewed the particular victim impact statement submitted in this case. Given the nature of the subject matter, it is a relatively straightforward and factual description of the effects of these murders on members of the Bronstein family. We are satisfied that the sentence of death was not imposed in this case under the influence of passion, prejudice or any other arbitrary factor. § 414(e)(1). There was no error here in the admission of the victim impact statement.

#### [224] XVIII

Booth has preserved in his eighteenth issue an argument that the Maryland capital sentencing procedure is unconstitutional under the United States Constitution in two respects, mandatoriness and a defendant’s burdens. These arguments were rejected as early as *Tichnell v. State* [*Tichnell I*], 287 Md. 695, 415 A.2d 830 (1980) and as recently as our opinion explaining the denial of motions for reconsideration in *Foster v. State*, *Evans v. State*, and *Huffington v. State*, 305 Md. 306, 503 A.2d 1326 (1986).

#### XIX

We find that the sentence of death in this case is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. § 414(e)(4). Booth killed 78-year-old Irvin Bronstein, while his hands were tied behind his back, by stabbing him in the chest twelve times, for the calculated purpose of preventing him from identifying Booth as a person who had entered the Bronsteins’ home and robbed them. Booth murdered Mrs. Bronstein, though not as a principal in the first degree. Booth has been adjudged guilty of another first-degree murder committed approximately one month before the murders of the Bronsteins. That judgment of conviction, while still under review, is presumptively correct. Booth’s criminal record also includes the following convictions: escape, 1983; escape, 1980; assault with intent to maim, 1978; assault, 1978; assault, 1975; assault with intent to maim, 1972; robbery, 1970.

Booth's co-perpetrator in the Bronstein murders, Reid, has been sentenced to death as the principal in the first degree of the murder of Mrs. Bronstein. That conviction has been affirmed. The death sentence imposed on Reid is under review but is presumptively correct. See *Reid v. State*, *supra*, 305 Md. 9, 501 A.2d 436.

Our comparability review has also included consideration of *Lawrence Johnson v. State*, 303 Md. 487, 495 [225] A.2d 1 (1985) and *Colvin v. State*, 299 Md. 88, 472 A.2d 953 (1984), in each of which we affirmed a death sentence imposed for the murder of an elderly person in that person's residence during the course of an entry and robbery.<sup>14</sup>

<sup>14</sup> The foregoing opinion does not discuss the jury instructions with respect to the point advanced by Judge McAuliffe in his dissent because no such claim of error in the instructions was raised by Booth in brief or argument on appeal. Even if the point were properly before us, there was no trial court error in the instructions.

What transpired is that one of Booth's proposed instructions dealt with the weighing of mitigating and aggravating circumstances. The last sentence of the three sentence proposed instruction read: "If a comparison of the totality of the aggravating factors with a totality of the mitigating factors leaves you in doubt as to the proper penalty you must impose life imprisonment." The instruction as given reads in relevant part:

Let's go to section three on page five [of the special verdict form]. Now section three says as follows: Based on the evidence, we unanimously find that it has been proven by a preponderance of the evidence that the mitigating circumstances marked yes in section two outweigh the aggravating circumstances marked yes in section one. There is a place for you to indicate yes or no and let me again stress the requirement of unanimity. That is, the finding under circumstance three must be the finding of all twelve jurors. With respect to section three, in balancing the various factors, you are not involved in a mere counting process. It is a weighing process and you may find that a single mitigating circumstance is sufficient in weight to justify a life sentence even if you find more than one aggravating circumstance. Conversely, you may conclude that a single aggravating circumstance, once weighed against the mitigating circumstances, is sufficient to justify a sentence of death. The number of aggravating and mitigating circumstances you find is not determinative in this balancing process. Rather you should decide what weight and quality each factor deserves and by your reasonable judgment in balancing the aggravating and mitigating circumstances, which you find to have been proven[,] you will determine whether the sentence will be life imprisonment or imposition of death. If you find that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death. If you find that the mitigating

## JUDGMENT AFFIRMED.

[226] ELDRIDGE, Judge, concurring in part and dissenting in part.

The Supreme Court of the United States expressly held in *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), that comment by the prosecution on the defendant's refusal to testify is forbidden by the Fifth Amendment. Furthermore, in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Supreme Court held, under the circumstances, that such comment could not be deemed harmless error.

circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life.

The sole defense exception to the instructions claimed a "failure to give our requested instructions in full, in the way they are written."

The Court in a criminal cause "need not grant a requested instruction if the matter is fairly covered by instructions actually given." MD.R. 4-325(c). Nor may a party assign as error "the failure to give an instruction unless the party objects. . . stating distinctly the matter to which the party objects and the grounds of the objection." MD.R. 4-325(e). This exception is inadequate to call to the trial judge's attention a claimed defect by way of the absence of an instruction on ultimate burden of proof so that the issue was not preserved in the trial court for direct review. Further, the issue was waived on appeal by the omission from appellant's brief of any claim of error in omitting an express instruction covering an even balance result in the weighing process.

Nor is the absence of an equipoise instruction "plain error in the instructions, material to the rights of the defendant, despite a failure to object," of which we might take cognizance under MD.R. 4-325(e). The instruction as given tracked the statute. In *Foster v. State*, 304 Md. 439, 477-78, 499 A.2d 1236, 1256 (1985), we explained that the statute does not contain a clear inference regarding the allocation of the burden of proof or risk of nonpersuasion absent an additional provision specifying the result if the sentencing authority found that mitigating and aggravating circumstances were in a state of even balance or if the sentencing authority was unable to determine which outweighed the other. Consequently, in *Tichnell v. State*, 287 Md. 695, 415 A.2d 830 (1980), this Court interpreted the statute to place the burden of persuasion upon the prosecution with regard to weighing of aggravating and mitigating circumstances. Because the statute does not place the burden of persuasion with regard to the weighing process on the accused, the instructions in the instant case which tracked the statute did not place the burden on the accused.

By this analysis we do not indicate any opinion on the constitutionality of a statute imposing such a "burden" on a capital defendant.



Departing from the Supreme Court's *Griffin* holding, the majority today decides that a defendant who declines to be a witness in the sentencing phase of his capital murder trial invites criticism for failing to take the stand merely because he exercises his state law right of allocution. The majority construes the defendant's speech in mitigation of his sentence [227] as a waiver of his Fifth Amendment right not to be a witness, and accordingly allows the prosecution to rebuke the defendant for not taking an oath and submitting to cross examination. I disagree.

In his closing argument to the jury in the sentencing phase of this capital murder trial, the prosecutor said:

"[PROSECUTING ATTORNEY]: There is but one reason John Booth did not take the witness stand and present his story as he told it to you in allocution. I'm not so naive a man to believe Mr. Booth would be so moved by the prospect of an oath that he would not break his oath. But, ladies and gentlemen, he stood here and testified, not under oath, for one reason only, to avoid cross-examination.

"[DEFENSE ATTORNEY]: Objection, your Honor.

"THE COURT: Overruled.

"[PROSECUTING ATTORNEY]: I assure you we had some questions for Mr. Booth. I ask you, don't be conned by this con man, don't be conned by this man who travels with fifteen names, don't be conned by a most accomplished liar."

These statements expressly criticized the defendant for declining to testify under oath and for avoiding cross examination. Such statements should not be included among the responses properly allowed by the majority opinion when a defendant exercises his right to allocute, namely, a rebuttal by record evidence and a reminder that what is said in allocution is not under oath, not subject to cross examination, and not evidence.

Comment on the refusal to testify penalizes the defendant for exercising a constitutional privilege. *Griffin v. California*, *supra*, 380 U.S. at 614, 85 S.Ct. at 1232. In fact, long before the Supreme Court's decision in *Griffin*, this Court flatly held that such comment violated a defendant's rights and was improper. *Smith v. State*, 169 Md. 474, 476, 182 A. 287 (1936). When a timely objection is made, as it was here, and no curative instruction is given, this kind of [228] comment ordinarily constitutes clear prejudice and requires reversal. *Dill v. State*, 10 Md.App. 362, 364, 270 A.2d 489 (1970). *See also McDonald v. State*, 61 Md.App. 461, 476, 487 A.2d 306 (1985).

When a defendant does not take the stand, but nevertheless injects unsupported or disputed factual statements into allocution, jury argument or questions to a witness, some courts have found a limited waiver of the defendant's privilege to avoid adverse comment on his silence. *See, e.g., Jones v. State*, 381 So.2d 983 (Miss.), *cert. denied*, 449 U.S. 1003, 101 S.Ct. 543, 66 L.Ed.2d 300 (1980); *Bontempo v. Fenton*, 692 F.2d 954 (3d Cir.1982), *cert. denied*, 460 U.S. 1055, 103 S.Ct. 1506, 75 L.Ed.2d 935 (1983); *United States ex rel. Miller v. Follette*, 278 F.Supp. 1003 (E.D.N.Y.), *aff'd* 397 F.2d 363 (2d Cir., 1968), *cert. denied*, 393 U.S. 1039, 89 S.Ct. 660, 21 L.Ed.2d 585 (1969). The majority relies upon this line of cases. Such reliance, however, is misplaced.

The principal case relied on by the majority is the opinion of the Supreme Court of Mississippi in *Jones v. State*, *supra*. In *Jones*, the defendant declined to testify at the guilt or innocence phase of his trial for murder, but in his argument to the jury at the sentencing phase he made factual allegations unsupported by the record. The Mississippi Court ruled that "the prosecution may comment to the jury that the defendant's statements were not given under oath and that he was not subject to cross-examination about them." 381 So.2d at 993. In a subsequent case, *Williams v. State*, 445 So.2d 798 (Miss.1984), *cert. denied*, \_\_\_ U.S. \_\_\_, 105 S.Ct. 803, 83 L.Ed.2d 795 (1985), after the defendant, at the sentencing



phase of his murder trial, had made an unsworn statement not supported by the record; the prosecution "commented to the jury, in unfavorable terms, about the [defendant's] failure to give his version of the facts while under oath and subject to cross examination." 445 So.2d at 814. The court noted its limited waiver holding in *Jones, supra*, and held that the prosecution's comment, along with other errors, required reversal for a new sentencing proceeding. The Mississippi Court thus distinguished [229] comments explaining the nature of allocution from comments criticizing the defendant for not giving testimony.

The same distinction appears in *State v. Bontempo*, 170 N.J.Super. 220, 406 A.2d 203 (1979), and *Bontempo v. Fenton, supra*, 692 F.2d 954. Both the state and federal post conviction proceedings in *Bontempo* determined that the prosecution's comments constituted proper rebuttal to the defendant's statements and did not amount to comments on the defendant's failure to testify. 170 N.J.Super at 244-245; 692 F.2d at 959.

Even when defendants represent themselves and try to evade the hazards of taking the stand by interjecting factual statements into their legal defense, courts will protect the defendants' Fifth Amendment rights and allow the prosecution to comment only "that the defendant's statements were not given under oath while he was subject to cross examination and that they are, therefore, less weighty than sworn testimony." *United States ex rel. Miller v. Follette, supra*, 278 F.Supp. at 1007. The prosecution or court is allowed to comment on the quality of the statements made, but not to comment on the defendant's decision not to take the stand. *State v. Polk*, 5 Or.App. 605, 485 P.2d 1241 (1971); *State v. Johnson*, 121 Wis.2d 237, 358 N.W.2d 824 (1984). See *Redfield v. United States*, 315 F.2d 76 (9th Cir.1963); *Smith v. United States*, 234 F.2d 385 (5th Cir.1956); *State v. Schultz*, 46 N.J. 254, 216 A.2d 372, cert. denied, 384 U.S. 918, 86 S.Ct. 1367, 16 L.Ed.2d 439 (1966).

I agree with the majority that the prosecuting attorney in this case was entitled to tell the jury that evidence includes

testimony under oath or subject to cross examination, but I cannot agree that the prosecution is permitted to tell the jury that the defendant did not take the witness stand in order to avoid cross examination.

I concur in the judgment insofar as it upholds the guilty verdicts, but I would remand the case for a new capital sentencing proceeding.

[230] COLE, Judge, concurring in part and dissenting in part.

The Court today affirms its dicta in *Lodowski v. State*, 302 Md. 691, 490 A.2d 1228 (1985) regarding victim impact statements and holds that there is no constitutional defect in the use of this evidence in capital sentencing proceedings. I vehemently disagree, and for the reasons stated in my opinion in *Lodowski*, I dissent.

Because of the importance of the constitutional issues involved, I shall restate in part what I said in *Lodowski* to show that the portion of Md.Code (1957, 1982 Repl. Vol., 1985 Cum.Supp.), Art. 41, § 124(d) authorizing the use of victim impact statements in capital sentencing proceedings is unconstitutional and that the admission of victim impact evidence in this case violated the eighth and fourteenth amendments of the United States Constitution.

I prefaced my opinion in *Lodowski* with several observations which I shall reiterate. First I do not object to the use of relevant victim impact evidence from the victim in *non-capital* sentencing proceedings. Such evidence can be valuable in sentencing proceedings, and when "coupled with active victim participation, acts to restore and increase confidence in the criminal justice system." 302 Md. at 754, 490 A.2d at 1260. My objection here is to the use of impact statements from the family of the victim in capital sentencing proceedings. I sympathize with the families of victims of heinous crimes and I realize that these persons suffer immense pain and untold emotional trauma. Nevertheless, "the court's paramount duty

is to preserve the integrity and fundamental fairness of the criminal justice system guaranteed to every citizen under our federal and state constitutions." *Id.*

# I

In *Lodowski*, I reviewed the Supreme Court decisions delineating the constitutional boundaries of capital sentencing procedures. I shall not repeat this analysis here, but I must stress that my discussion in *Lodowski* makes clear [231] that the eighth and fourteenth amendments require two basic safeguards in capital sentencing proceedings: (1) the death penalty must "not be imposed under sentencing procedures that create[ ] a substantial risk that it [will] be inflicted in an arbitrary and capricious manner," *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859, 883 (1976) (Stewart, J., joined by Powell and Stevens, JJ.); and (2) capital sentencing procedures must "guide[ ] and focus[ ] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender." *Jurek v. Texas*, 428 U.S. 262, 273-74, 96 S.Ct. 2950, 2957, 49 L.Ed.2d 929, 939 (Stevens, J., joined by Stewart and Powell, JJ.) (emphasis supplied); see also *Proffitt v. Florida*, 428 U.S. 242, 259, 96 S.Ct. 2960, 2970, 49 L.Ed.2d 913, 927 (1976) (Powell, J., joined by Stewart and Stevens, JJ.). These principles form the constitutional foundation for modern death penalty statutes, and it is in light of these precepts that the use of victim impact evidence must be examined.

The use of victim impact statements in capital sentencing proceedings in Maryland is authorized by Art. 41, § 124(d), which provides:

- (d) In any case which the death penalty is requested under Article 27, § 412, a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted under Art. 27, § 413. [Emphasis supplied.]

Section 124(c)(3) describes the victim impact statement itself. It states:

- (3) A victim impact statement shall:
- (i) Identify the victim of the offense;
  - (ii) Itemize any economic loss suffered by the victim as a result of the offense;
  - [232]d) (iii) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;
  - (iv) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;
  - (v) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and
  - (d) (vi) Contain any other information related to the impact of the offense upon the victim or the victim's family that the court requires.

I believe that the language providing for the use of victim impact statements in capital sentencing proceedings cannot withstand constitutional scrutiny under the eighth and fourteenth amendment principles set forth *ante*. As I stated in *Lodowski*,

At a constitutional minimum, evidence introduced at a capital sentencing proceeding must be relevant as to whether the accused's life be taken or spared. The information must be relevant, of course, to avoid the arbitrary and capricious infliction of the death penalty. In light of this standard, several portions of § 124(c)(3) pass muster. For instance, the identity of the victim (e.g., police officer) is often relevant, see § 124(c)(3)(i), as is other information that goes to the character of the defendant and the circumstances of the offense, see § 124(c)(3)(vi).

Other information called for by § 124(c), however, would rarely, if ever, be relevant in a capital sentencing proceeding. In particular, psychological services requested by the victim's family



as a result of the offense are irrelevant. See § 124(c)(3)(v). In addition, it is difficult to see the relevance of whether the victim suffered any economic loss as a result of the offense, unless of course the victim was murdered during the course of a robbery or similarly economically-motivated crime. See § 124(c)(3)(ii). Section 124(c)(3)(iii), which deals with the [233] identification of any physical injury suffered by the victim as a result of the crime along with its seriousness and permanence, seems superfluous in a capital case for obvious reasons. Lastly, any changes in the victim's familial relationships as a result of the offense are irrelevant to the sentencing decision. See § 124(c)(3)(iv). Otherwise, a factor in imposing the death penalty would always be whether the victim died leaving a family. Few factors could be as irrelevant and arbitrary as those called for in §§ 124(c)(3)(ii), 124(c)(3)(iii), 124(c)(3)(iv), and 124(c)(3)(v).

302 Md. at 764, n. 6, 490 A.2d 1228, n. 6.

This type of evidence, the, interjects into the capital sentencing proceedings that same uncertainty and subjectivity decried by the Supreme Court in *Gregg*, *Profitt* and *Jurek*. What can be a more arbitrary factor in the decision to sentence a defendant to death than the words of the victim's family, which vary greatly from case to case, depending upon the ability of the family member to express his grief, or even worse depending upon whether the victim has family at all? In more practical terms, a killer of a person with an educated family would be put to death, whereas in a crime of similar circumstances, the killer of a person with an uneducated family or one without a family would be spared. This result cannot be countenanced, if only upon the realization that lives cannot be compared as to their respective worth.

As I see it, the ultimate crime is the taking of life, and there can be no further measurement as to the value of the life taken. The proper focus in the capital sentencing procedure must be upon the circumstances "of the individual offense and the individual offender," *Jurek v. Texas*, *supra*, 428 U.S. at 273-74, 96 S.Ct. at 2957, 49 L.Ed.2d at 939 (Stevens, J., joined by Stewart & Powell, JJ.), and not upon the particular victim's family.

In support of its holding that there is no *per se* constitutional error in the use of victim impact statements in capital proceedings, the Court quotes the following from *Trimble v. State*, 300 Md. 387, 425, 478 A.2d 1143, 1155 (1984):

[234] "The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.

"In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." [Quoting *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 2929-30, 49 L.Ed.2d 859, 880 (1976) (opinion announcing judgment) (footnotes omitted).]

In quoting this passage from *Trimble*, which is an exact quote from *Gregg v. Georgia*, the majority fails to note that *Gregg* also stands for the proposition that society's outrage at criminal acts and its need for retribution must be tempered by objectivity in the determination of whether a person is to be put to death. The *Gregg* plurality recognized that our moral outrage at offensive conduct may not be vented in an arbitrary and capricious manner. *Gregg v. Georgia*, *supra*, 428 U.S. at 188, 96 S.Ct. at 2932, 49 L.Ed. at 883 (Stewart, J., joined by Powell and Stevens, JJ.). Integral to the "legal process" on which our citizens must rely is the guarantee that the process will be fair and that our laws will be applied uniformly. Because victim impact evidence robs a capital sentencing proceeding of fairness and uniformity, its use cannot justifiably be sanctioned.

## II

Putting aside the constitutionality of the statute itself, it is clear in this case that the victim impact evidence is unconstitutional. I stated in *Lodowski* that:



Time and again, the Supreme Court has emphasized that the sentencer's discretion in a capital proceeding must be channeled and guided by clear, specific, and objective standards. See, e.g., *Barclay v. Florida*, *supra*, 463 U.S. [939] at 949, 103 S.Ct. [3418] at 3424, 77 L.Ed.2d [1134] at 1144; *Godfrey v. Georgia*, *supra*, 446 U.S. [420] [235] at 428, 100 S.Ct. [1759] at 1764-65, 64 L.Ed. [398] at 406; *Woodson v. North Carolina*, *supra*, 428 U.S. [280] at 303, 96 S.Ct [2978] at 2990-91, 49 L.Ed.2d [944] at 960. Evidence that has the effect of arousing the passion and prejudice of the sentencer does not satisfy this constitutional standard. Similarly, evidence irrelevant to the sentencing decision has no place in a capital sentencing proceeding.

302 Md. at 764-65, 490 A.2d at 1265-66. As in *Lodowski*, a review of the victim impact statement in this case clearly demonstrates these points.

Agent Michelle Swann prepared a victim impact statement through interviews with the victims' son, daughter, son-in-law, and granddaughter. Agent Swann writes of the victims' son that he:

saw his parents alive for the last time on May 18th. They were having their lawn manicured and were excited about the onset of spring. He called them on the phone that evening and received no answer. He had made arrangements to pick Mr. Bronstein up on May 20th. They were both to be ushers in a granddaughter's wedding and were going to pick up their tuxedos. When he arrived at the house on May 20th he noticed that his parents' car wasn't there. A neighbor told him she hadn't seen the car in several days and he knew something was wrong. He went to this [sic] parents' house and found them murdered. He called his sister crying and told her to come right over because something terrible had happened and their parents were both dead.

\* \* \* \*

The victims' son states that he can only think of his parents in the context of how he found them that day, and he can feel their fear and horror. It was 4:00 p.m. when he discovered their bodies and this stands out in his mind. He

is always aware of when 4:00 p.m. comes each day, even when he is not near a clock. He also wakes up at 4:00 a.m. each morning. The victims' son states that he suffers from a lack of sleep. He is unable to drive on [236] the streets that pass near his parents' home. He also avoids driving past his fathers' favorite restaurant, the supermarket where his parents shopped, etc. He is constantly reminded of his parents. He sees his father coming out of synagogues, sees his parents' car, and feels very sad whenever he sees old people. The victims' son feels that his parents were not killed, but were butchered like animals. He doesn't think anyone should be able to do something like that and get away with it. He is very angry and wishes he could sleep and not feel so depressed all the time. He is fearful for the first time in his life, putting all the lights on and checking the locks frequently. His children are scared for him and concerned for his health. They phone him several times a day. At the same time he takes a fearful approach to the whereabouts of his children. He also calls his sister every day. He states that he is frightened by his own reaction of what he would do if someone hurt him or a family member. He doesn't know if he'll ever be the same again.

As with the testimony of Fletcher's widow in *Lodowski*, the testimony of the Bronsteins' son, however deserving of sympathy,

does not channel and guide the sentencer's discretion in a constitutionally permissible manner. By appealing to the passions and prejudices of the sentencing authority, the above quoted passage[] represent[s] and "arbitrary factor" in the decisional process. In my view, it is arbitrary to base a decision as to whether an accused should live or die on the basis of subjective impressions a [family member] has of the crime. . . . Predicating the death penalty decision on this type of evidence propels us full force to the pre-Furman era of the arbitrary imposition of capital punishment.

302 Md. at 766, 490 A.2d at 1266.

The portion of the victim impact statement dealing with the impact of the victims' death upon their daughter and her husband further demonstrates this conclusion:

[237] The victims' daughter and her husband didn't eat dinner for three days following the discovery of Mr. and Mrs. Bronstein's bodies. They cried together every day for four months and she still cries every day. She states that she doesn't sleep through a single night and thinks a part of her died too when her parents were killed. She reports that she doesn't find much joy in anything and her powers of concentration aren't good. She feels as if her brain is on overload. The victims' daughter relates that she had to clean out her parents' house and it took several weeks. She saw the bloody carpet, knowing that her parents had been there, and she felt like getting down on the rug and holding her mother. She wonders how this could have happened to her family because they're just ordinary people. The victims' daughter reports that she had become noticeably withdrawn and depressed at work and is now making an effort to be more outgoing. She notes that she is so emotionally tired because she doesn't sleep at night, that she has a tendency to fall asleep when she attends social events such as dinner parties or the symphony. The victims' daughter states that wherever she goes she sees and hears her parents. This happens every day. She cannot look at kitchen knives without being reminded of the murders and she is never away from it. She states that she can't watch movies with bodies or stabbings in it. She can't tolerate any reminder of violence. The victims' daughter relates that she used to be very trusting, but is not any longer. When the doorbell rings she tells her husband not to answer it. She is very suspicious of people and was never that way before.

The victims' daughter attended the defendant's trial and that of the co-defendant because she felt someone should be there to represent her parents. She had never been told the exact details of her parents' death and had to listen to the medical examiner's report. After a certain point, her mind blocked out and she stopped hearing. She states that her parents were stabbed repeatedly with [238] viciousness and she could never forgive anyone for killing them that way. She can't believe that anybody could do that to someone. The victims' daughter states that animals wouldn't do this. They didn't have to kill because there was no one to stop them from looting. Her father would have given them anything. The murders show the viciousness of the killer's anger. She doesn't feel that the people who did

this could ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this. She feels that the lives of her family members will never be the same again.

As I said in *Lodowski*, "the punishment of death, unique in its severity and irrevocability, see *Gregg v. Georgia*, *supra*, 428 U.S. at 187, 96 S.Ct. at 2931, 49 L.Ed.2d at 822, should not turn upon these considerations." 302 Md. at 767, 490 A.2d at 1267.

Agent Swann also reports the following concerning the victims' grandchildren:

Since the Jewish religion dictates that birth and marriage are more important than death, the granddaughter's wedding had to proceed on May 22nd. She had been looking forward to it eagerly, but it was a sad occasion with people crying. The reception, which normally would have lasted for hours, was very brief. The next day, instead of going on her honeymoon, she attended her grandparents' funerals. The victims' son, who was an usher at the wedding, cannot remember being there or coming and going from his parents' funeral the next day. The victims' granddaughter, on the other hand, vividly remembers every detail of the days following her grandparents' death. Perhaps she described the impact of the tragedy most eloquently when she stated that it was a completely devastating and life altering experience.

\* \* \* \*

The victims' granddaughter states that unless you experience something like this you can't understand how it feels. You are in a state of shock for several months and then a terrible depression sets in. You are so angry and feel such [239] rage. She states that she only dwells on the image of their death when thinking of her grandparents. For a time she would become hysterical whenever she saw dead animals on the road. She is not able to drive near her grandparents' house and will never be able to go into their neighborhood again. The victims' granddaughter also has a tendency to turn on all the lights in her house. She goes into a panic if her husband is late coming home from work. She used to be an avid reader of murder mysteries, but



will never be able to read them again. She has to turn off the radio or T.V. when reports of violence come on because they hit too close to home. When she gets a newspaper she reads the comics and throws the rest away. She states that it is the small everyday things that haunt her constantly and always will. She saw a counselor for several months but stopped because she felt no one could help her.

The victims' granddaughter states that the whole thing has been very hard on her sister too. Her wedding anniversary will always be bittersweet and tainted by the memory of what happened to her grandparents. This year on her anniversary she and her husband quietly went out of town. The victims' granddaughter finds that she is unable to look at her sister's wedding pictures. She also has a picture of her grandparents, but had to put it away because it was too painful to look at it.

Again although deserving of much sympathy, the effect of the victims' death upon their grandchildren is irrelevant to the sentencing process and serves only to arouse the passion and prejudice of the sentencer.

### III

In its closing argument, the State referred to the victim impact statement and argued as follows:

Ladies and gentlemen, if they prove the one mitigating circumstance or if they prove two or ten or a hundred or [240] two hundred or a thousand, nothing whatsoever about this man, about his background, about his feelings, about his emotions, about his moral capacity, could ever, in any way, outweigh the importance of what he did that day in May last year. . . . *If you get to section three and you have to balance it, take this presentence report and read out loud what is entitled the victim impact statement. For ladies and gentlemen that is the ultimate dimension of the crime he has committed.* . . . [Emphasis supplied.]

As I noted in *Lodowski*, however, the procedure for the determination of whether the defendant must be put to death under § 413 does not include the victim impact statement as one

of the aggravating circumstances to be weighed against the mitigating circumstances:

Of the ten aggravating circumstances listed in § 413(d), none specifically provides for consideration of victim impact evidence. Moreover, § 413(d) does not contain a "catch-all" similar to that set forth in the mitigating circumstances subsection (§ 413(g)) that would permit the sentencing authority to consider victim impact evidence. In the case *sub judice*, the sentencer did not consider the victim impact evidence as a mitigating circumstance. For obvious reasons, victim impact evidence would rarely, if ever, be considered as a mitigating circumstance. Thus, the sentencer necessarily must have considered that evidence as an aggravating circumstance without entering it into the formal statutory weighing process. Nowhere does § 413 permit the sentencing authority to weigh the mitigating and aggravating circumstances, then the victim impact evidence, at the time of sentencing. The imposition of the death penalty in this case therefore did not comport with the sentencing procedures contained in § 413.

302 Md. at 785-86, 430 A.2d at 1276.

Impact evidence from the victim's family has but one purpose: "to exacerbate the aggravating circumstances established [241] by the prosecution. *Id.* at 786, 490 A.2d at 1276. This type of evidence, however, has no place in a statutory weighing process which owes its very existence to the constitutional mandate that the death penalty must not be administered in an arbitrary or capricious manner.

In my view, victim impact evidence as was introduced in Booth's death sentencing is constitutionally impermissible. While I concur in the judgment insofar as it upholds the guilty verdicts, I would vacate the sentence and remand for another sentencing proceeding which does not include such evidence.

McAuliffe, Judge, concurring in part and dissenting in part.

I concur in the affirmance of the conviction, but dissent from the decision to affirm the sentence of death.



For the reasons stated in the concurring and dissenting opinion in *Evans v. State*, 304 Md. 487, 539-40, 499 A.2d 1261 (1985), I believe the Maryland death penalty statute is in part unconstitutional. I agree with the contention made by Booth in his eighteenth argument that our statute impermissibly places the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances in order to avoid the penalty of death.

Unfortunately, the erroneous allocation of the burden of persuasion that originated in the statute was perpetuated in the instruction given to this jury. Although the trial judge stated he was granting Booth's proposed instruction number 9, which correctly assigned to the State the burden of establishing that the aggravating circumstances outweighed the mitigating circumstances in order to justify a sentence of death, he did not give that instruction.<sup>15</sup> Rather, [242] he instructed the jury in the language of the statute and of the Finding and Sentencing Determination Form, and therefore effectively conveyed to the jury the erroneous message that in order to avoid a sentence of death the burden rested upon the defendant to prove by a preponderance of the evidence that the mitigating circumstances outweighed the aggravating circumstances.

I would vacate the sentence and remand for a new sentencing proceeding.

<sup>15</sup> The majority opinion sets forth, in footnote 14, only the concluding sentence of Booth's proposed Instruction No. 9. I believe it is helpful to view the proposed instruction in its entirety:

Your next duty will be to weigh any mitigating circumstances which exists (sic) against any aggravating circumstances which exist.

## Supreme Court of the United States

\_\_\_\_\_  
No. 86-5020  
\_\_\_\_\_

JOHN BOOTH,

*Petitioner*

v.  
MARYLAND  
\_\_\_\_\_

ON PETITION FOR WRIT OF CERTIORARI TO THE APPEALS COURT OF THE STATE OF MARYLAND.

On Consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ or certiorari be, and the same is hereby, granted, limited to Question 3 presented by the petition.

October 14, 1986

# **PETITIONER'S BRIEF**

(6)  
No. 86-5020

Supreme Court, U.S.  
FILED

DEC 2 1986

JOSEPH F. SPANIOL, JR.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

JOHN BOOTH,

*Petitioner,*

v.

STATE OF MARYLAND,

*Respondent.*

On Writ Of Certiorari To The  
Court Of Appeals Of Maryland

**PETITIONER'S BRIEF**

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**QUESTION PRESENTED**

Did the use of victim impact evidence at Petitioner's capital sentencing violate the Eighth and Fourteenth Amendments?

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**OPINION BELOW**

The opinion of the Court of Appeals of Maryland is reported at 306 Md. 172, 507 A.2d 1098 (1986) and is reproduced in the Joint Appendix at 90.

**JURISDICTION**

The opinion of the Court of Appeals of Maryland was filed on May 7, 1986. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(3).

**CONSTITUTIONAL PROVISIONS AND STATUTES**

The following are set forth in the Appendix to this Brief:

**CONSTITUTIONAL PROVISIONS****United States Constitution****Amendments VIII, XIV****STATUTES****Maryland Code, Article 27 (1982 and 1984 Supp.)****Sections 412, 413 and 414****Maryland Code, Article 41 (1984 Supp.)****Section 124****STATEMENT OF THE CASE**

Petitioner, John Booth, was convicted of the robbery and murder of an elderly couple, Irvin and Rose Bronstein. Pursuant to Maryland Code, Article 27, §§ 412-415, the jury sentenced Petitioner to death for the murder of Mr. Bronstein. Petitioner also received consecutive sentences of life imprisonment for the murder of Mrs. Bronstein and twenty years imprisonment each for the two counts of robbery and conspiracy to rob. On May 7, 1986,



the Court of Appeals of Maryland affirmed Petitioner's convictions and sentences. This Court issued a Writ of Certiorari on October 14, 1986.

At Petitioner's capital sentencing, the court admitted into evidence a Victim Impact Statement, as authorized by Maryland Code, Article 41, § 124 (1984 Supp.) over Petitioner's protest that such admission would violate the Eighth Amendment. (J.A. 8.) The report stressed the good qualities of the victims<sup>1</sup> and the effects of the murders upon the family members' health and well-being.<sup>2</sup> The report noted that some of the grandchildren first learned of their grandparents' deaths from television reports. (J.A. 60.) One granddaughter's wedding two days later was a sad occasion, with people crying, and the

<sup>1</sup> Mr. and Mrs. Bronstein had been married for fifty-three years and enjoyed a close relationship. Mr. Bronstein had been a hard worker and Mrs. Bronstein was "young at heart." (J.A. 59.) They were "amazing people" with many devout friends and "extremely good people who wouldn't hurt a fly." (J.A. 63.)

<sup>2</sup> One of the granddaughters described the tragedy as "a completely devastating and life altering experience." (J.A. 60.) The victim's son said that he can only think of his parents "in the context of how he found them that day and he can feel their fear and horror." (J.A. 60.) Several family members suffered from lack of sleep, fear, depression and were constantly reminded of the Bronsteins' deaths. (J.A. 60-61.) One granddaughter became hysterical at the sight of dead animals, had to restrict her reading and television viewing and felt that her sister's wedding anniversary would always be tainted by her grandparents' deaths. (J.A. 62-63.) She was unable to look at her sister's wedding pictures or pictures of her grandparents. (J.A. 63.) The victims' daughter and her husband did not eat dinner for three days following the discovery of the victim's bodies; they cried together every day for four months. She still cries every day. She thinks that part of her died when her parents were killed and finds no joy in life anymore. (J.A. 61.)

reception was brief. Instead of leaving for her honeymoon, she attended her grandparents' funeral. (J.A. 60.) The funeral was described as the largest in the history of the funeral home and the family received over 1,000 sympathy cards each of which was answered personally. (J.A. 63.)

The statement also described a son's feeling that his parents were "butchered like animals" and stated that he did not think that anyone should be able to do something like that and get away with it. (J.A. 61.) The victims' daughter said that she could never forgive anyone for killing her parents by stabbing them repeatedly with viciousness. She said that "animals wouldn't do this." She did not feel that the killers "could ever be rehabilitated and doesn't want them to be able to do this again or put another family through this." She feels that the family members' lives will never be the same. (J.A. 62.) The statement reported that the family wanted "swift and just punishment." (J.A. 63.) The statement concluded as follows:

Because of their loss, a terrible void has been put into their lives and every day is still a strain to get through. It became increasingly apparent to the writer as she talked to the family members that the murder of Mr. and Mrs. Bronstein is still such a shocking, painful, and devastating memory to them that it permeates every aspect of their daily lives. It is doubtful that they will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them.

(J.A. 64.)

In the Court of Appeals of Maryland, Petitioner argued that the admission of victim impact evidence at his capital

sentencing proceeding violated the Eighth and Fourteenth amendments (J.A. 129) and that Maryland Code, Article 41, § 124 (1984 Supp.) providing for its admission violates the Eighth and Fourteenth Amendments. (J.A. 129.) The Court of Appeals held that victim impact evidence is admissible in capital sentencing proceedings. (J.A. 129-131.)

#### SUMMARY OF ARGUMENT

The decision of the Court of Appeals that victim impact evidence is admissible is flawed in three ways: it allows consideration of irrelevant facts; it assumes that victim impact evidence furthers a proper sentencing objective; and it concludes that the victim impact statement admitted below did not interject arbitrariness into the proceedings.

The punishment of death is qualitatively different and there is thus a need for reliability in the determination that death is the appropriate punishment. A death sentence must be based on objective consideration of the defendant's character and the circumstances of the crime. Evidence not bearing on these factors is irrelevant.

The introduction of victim impact evidence defeats efforts to channel the jury's discretion and interjects arbitrariness into the proceedings.

Victim impact evidence does not further the proper sentencing objectives of deterrence and retribution. Private vengeance and retribution, the only objectives furthered by victim impact evidence, are not proper sentencing objectives.

The statement admitted below was calculated to inflame the jury and was the antithesis of the objective considerations mandated by the Eighth Amendment.

#### ARGUMENT

##### **The Admission Of Victim Impact Evidence At Petitioner's Capital Sentencing Violated The Eighth And Fourteenth Amendments.**

In upholding the admission of victim impact evidence, the Court of Appeals held:

There is no *per se* constitutional defect in using a victim impact statement at a capital sentencing proceeding. The sentencing authority is not constitutionally restricted to considering only the operative facts in the commission of the crime, in addition to the circumstances of the perpetrator. This Court, speaking through Judge Cole in *Trimble v. State*, 300 Md. 387, 425, 478 A.2d 1143, 1155 (1984), explained the purposes behind the death penalty.

"The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.

"In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." [quoting *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 2929-30, 49 L.Ed.2d 859, 880 (1976) (opinion announcing judgment) (footnotes omitted).]

We have also reviewed the particular victim impact statement submitted in this case. Given the nature of the subject matter, it is a relatively straightforward and factual description of the effects of these murders on members of the Bronstein family. We are satisfied that the sentence of death was not imposed in this case under the influence of passion, prejudice or any other arbitrary factor. § 414(e)(1). There was no error here in the admission of the victim impact statement.



(J.A. 130-31.) The difficulties in the Court's reasoning are threefold: first, the Court allows consideration of facts irrelevant to the circumstances of the crime and the character of the offender; secondly, the Court assumes that the admission of victim impact evidence furthers a proper sentencing objective; and thirdly, the Court concludes that, despite its irrelevant and inflammatory content, the statement admitted below did not interject arbitrariness into the proceedings.

The punishment of death is "a punishment different from all other sanctions in kind rather than degree." *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976). Thus, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* at 305.

Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

*Gregg v. Georgia*, 428 U.S. 153, 189 (1976). The decision to impose the death penalty must "be, and appear to be, based on reason, rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). A death sentence must, therefore, be based upon an objective consideration of the character and record of the defendant and the circumstances of the crime. *Spaziano v. Florida*, 468 U.S. 447 (1984); *California v. Ramos*, 463 U.S. 991 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983); *Zant v. Stephens*, 462 U.S. 862 (1983); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Woodson v. North Carolina*, *supra*; *Gregg v. Georgia*, *supra*.

Evidence not bearing on the defendant's character,

prior record, or the circumstances of the crime is irrelevant. *Lockett v. Ohio*, 438 U.S. 586, 604 n.12 (1978). See *Stephens*, *supra* at 885. See also *People v. Holman*, 103 Ill. 2d 133, 469 N.E.2d 119, 134 (1984) (Evidence not bearing on aggravating or mitigating factors, circumstances of the offense or character or rehabilitative potential of the defendant must be excluded.). Equating victim impact evidence of the type admitted in this case with the "circumstances of the crime" as did the Court of Appeals has, with good reason, been described as "pure sophistry." *Moore v. Zant*, 722 F.2d 640, 653 n.3 (11th Cir. 1983) (Kravitch, J., concurring and dissenting). Victim impact statements describe not the *circumstances* of the crime but, rather, the *indirect consequences* of the crime. On this point, the reasoning of the California Court of Appeals in a non-capital case is persuasive:

The purpose of sentencing is to punish defendants in accordance with their level of culpability. We think it obvious that a defendant's level of culpability depends not on fortuitous circumstances such as the composition of his victim's family, but on the circumstances over which he has control. A defendant may choose, or decline, to premeditate, to act callously, to attack a vulnerable victim, to commit a crime while on probation, or to amass a record of offenses. All of the factors of Rule 421 are based upon such choices which the defendant makes of his own will. In contrast, the fact that a victim's family is irredeemably bereaved can be attributable to no act of will of the defendant other than his commission of homicide in the first place. Such bereavement is relevant to damages in civil action, but it has no relationship to the proper purposes of sentencing in a criminal case.

*People v. Levitt*, 156 Cal. App. 3d 500, 203 Cal. Rptr. 276, 288 (1984) (Emphasis added.)

The introduction of victim impact evidence defeats all



efforts to channel the jury's discretion. Its focus on the victim's character and the emotional impact of his death on family and friends cannot help but distract the jury from its task of weighing and balancing aggravating and mitigating factors. *People v. Holman*, *supra*, 469 N.E.2d at 135. Victim impact evidence like that admitted here does not further an individualized determination of sentence based on the character of the defendant and the circumstances of the crime. *Moore v. Zant*, *supra*, 722 F.2d at 652 (Kravitch, J., concurring and dissenting). It interjects arbitrariness into the deliberations by imparting an aggravating character to factors which are irrelevant to the life or death decision.<sup>3</sup> See *Zant v. Stephens*, *supra*, 462 U.S. at 885. It invites sentencing based on the relative social worth of the victim and the defendant, on whether the victim was precious to his survivors and on whether those survivors are articulate and can impress the jury. It trades on the victim's social position and class. See *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas J., concurring); *Moore v. Zant*, 722 F.2d at 646 and 722 F.2d at 651 (Kravitch, J., concurring and dissenting); *People v. Holman*, *supra*, 469 N.E.2d at 135. "The concern for avoiding arbitrariness naturally implies that imposing a death sentence on the bases of peculiar characteristics such as race, religion or wealth—is forbidden." *Moore v. Zant*, *supra*, 722 F.2d at 646. Distinctions like these are arbitrary since to punish on bases like these

<sup>3</sup> Here the victim impact evidence did not bear on a relevant sentencing factor as was arguably the case in *Moore v. Zant*, *supra*. In upholding the Georgia Supreme Court's ruling that the victim impact evidence, limited in scope and content, was admissible to rebut an issue which might have been raised by the defense, the majority recognized that "[a]ny exploration of the character of the victim is fraught with constitutional danger." 722 F.2d at 646.

"furtherers no discernible social or public purposes." *Furman v. Georgia*, *supra*, 408 U.S. at 312 (White, J., concurring).

In *Gregg v. Georgia*, *supra*, this Court concluded that the death penalty serves two social purposes: "retribution" and "deterrence of capital crimes by prospective offenders."<sup>4</sup> 428 U.S. at 183. See *Furman v. Georgia*, 408 U.S. at 308 (Stewart, J., concurring) and 342 (Marshall, J., concurring). See also C. Beccaria, *An Essay on Crimes and Punishments* 43-44 (4th ed. 1785). Despite the suggestion of the Court of Appeals to the contrary (J.A. 130), the admission of victim impact evidence at capital sentencings furthers neither of these two purposes.

Retribution has its origins in private vengeance and retaliation, *Furman*, *supra*, 408 U.S. at 333 (Marshall, J., concurring) but is distinguished from them as an "expres-

<sup>4</sup> Limitations on the purposes of punishment have been recognized for over two centuries.

From the foregoing considerations it is evident, that the intent of punishments, is not to torment a sensible being, nor to undo a crime already committed. Is it possible that torments and useless cruelty, the instrument of furious fanaticism, or the impotency of tyrants, can be authorized by a political body? Which so far from being influenced by passion, should be the cool moderator of the passions of individuals. Can the groans of a tortured wretch recall the time past, or reverse the crime he has committed?

The end of punishment therefore, is no other than to prevent the criminal from doing further injury to society, and to prevent others from committing the like offense. Such punishments, therefore, and such a mode of inflicting them, ought to be chosen as will make the strongest and most lasting impressions on the minds of others, with the least torment to the body of the criminal.

C. Beccaria, *An Essay on Crimes and Punishments* 43-44 (4th ed. 1785).

sion of society's moral outrage at particularly offensive conduct." *Gregg*, *supra* at 183. (Emphasis added.) See *Furman*, *supra* at 333 (Marshall, J., concurring). Private vengeance and retaliation have never been approved by this Court as permissible objectives in sentencing<sup>5</sup> and such objectives are at odds with the concept of crime as a public rather than a private wrong.<sup>6</sup> Victim impact evi-

<sup>5</sup> These objectives find little support in the scholarly literature. See C. Beccaria, *An Essay on Crimes and Punishments*, *supra*, at 43-44; J. Chitty, 1 *A Practical Treatise on Criminal Law* 3 (1816); Henderson, "The Wrongs of Victim's Rights," 37 *Stan. L. Rev.* 994-999 (1985). As Justice Marshall stated in his concurrence in *Furman*, *supra*:

The fact that the State may seek retribution against those who have broken its laws does not mean that retribution may then become the State's sole end in punishing. Our jurisprudence has always accepted deterrence in general, deterrence of individual recidivism, isolation of dangerous persons, and rehabilitation as proper goals of punishment. . . . Retaliation, vengeance and retribution have been roundly condemned as intolerable aspirations for a government in a free society.

408 U.S. at 343. (Citation omitted.)

<sup>6</sup> By 1775, the distinction between tort and crime was firmly established. *Atcheson v. Everitt*, 1 *Cowp.* 382, 391 (1775).

A tort is not the same thing as a crime, although the two sometimes have many features in common. The distinction between them lies in the interests affected and the remedy afforded by the law. A crime is an offense against the public at large, for which the state, as the representative of the public, will bring proceedings in the form of a criminal prosecution. The purpose of such a proceeding is to protect and vindicate the interests of the public as a whole, by punishing the offender or eliminating him from society, either permanently or for a limited time, by reforming him or teaching him not to repeat the offense, and by deterring others from imitating him. A criminal prosecution is not concerned in any way with compensation of the injured individual against whom the crime is committed, and his only part in it is that of an accuser and a witness for the state. So far as the criminal law is concerned, he will leave the courtroom empty-handed.

W. Prosser, *Handbook of The Law of Torts* 7 (4th ed. 1971). See also W. Blackstone, 3 *Commentaries on The Laws of England* 2 (1768); F.

dence serves no sentencing objectives in capital cases other than those of private vengeance and retaliation. Henderson, "The Wrong of Victim's Rights," *supra* at 987-999. It cannot deter nor can it express society's approbation and is thus irrelevant to those sentencing objectives approved in *Gregg*.

Virtually all of the victim impact evidence contained in the "relatively straightforward and factual" account (J.A. 131) admitted below was either irrelevant or calculated to engage the sympathies and emotions of the jurors. It thus violated the requirements of the Clause that the jury's discretion must be guided by clear, objective and specific standards. See *Barclay*, *supra*, 463 U.S. at 950; *Woodson*, *supra* at 303; *Lockett*, *supra* at 604 n.12. The victim impact statement detailed the emotional trauma suffered by family members and its adverse impact on their health and well being. It also detailed their feelings about the circumstances of the crime and the character of the defendant. This information provided by the grieving family is the antithesis of the objective considerations mandated by the Eighth Amendment.

Hilliard, 1 *The Law of Torts* 65 (1859); C. Kenny, *Outlines of The Criminal Law* 542 (16th ed. 1962); F. Pollock, *A Treatise on The Law of Torts* 3 (1894).

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that this Court reverse the judgment of the court below.

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## APPENDIX

## APPENDIX

### CONSTITUTIONAL PROVISIONS INVOLVED

#### United States Constitution, Article I, § 10:

No State shall . . . pass any . . . ex post facto Law . . .

#### United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

#### United States Constitution, Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

#### United States Constitution, Amendment XIV:

[N]or shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within the jurisdiction the equal protection of the laws.

**Maryland Declaration Of Rights, Article 17:**

That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* Law ought to be made; nor any retrospective oath or restriction be imposed, or required.

**Maryland Declaration Of Rights, Article 21:**

That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

**Maryland Declaration Of Rights, Article 25:**

That excessive bail ought not to be required,, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law.

**STATUTORY PROVISIONS INVOLVED****Maryland Code, Article 27, Sec. 386 (1982):**

If any person shall unlawfully shoot at any person, or shall in any manner unlawfully and maliciously attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut or wound any person, or shall assault or beat any person, with intent to maim, disfigure or disable such person, or with intent to prevent the lawful apprehension or detainer of any party for any offense for which the said party may be legally apprehended or detained, every such offender, and every person counselling, aiding or abetting such offender shall be guilty of a felony and, upon conviction thereof, be punished by confinement in the penitentiary for a period not less than eighteen months nor more than ten years.

**Maryland Code, Article 27, Sec. 407 (1982):**

All murder which shall be perpetrated by means of poison, or lying in wait, or by any kind of wilful, deliberate and premeditated killing shall be murder in the first degree.

**Maryland Code, Article 27, Sec. 412 (1982)**

(a) *Designation of degree by court or jury.*—If a person is found guilty of murder, the court or jury that determined the person's guilt shall state in the verdict whether the person is guilty of murder in the first degree or murder in the second degree.

(b) *Penalty for first degree murder.*—A person found guilty of murder in the first degree shall be sentenced either to death or to imprisonment for life. The sentence shall be imprisonment for life unless (1) the State notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of death, and advised the person of each aggravating circumstance upon which it intended to rely, and (2) a sentence of death is imposed in accordance with Sec. 413.

(c) *Penalty for second degree murder.*—A person found guilty of murder in the second degree shall be sentenced to imprisonment for not more than 30 years.

**Maryland Code, Art. 27, Sec. 413 (1982 and 1984 Supp.):****§ 413 Sentencing procedure upon finding of guilty of first degree murder.**

(a) *Separate sentencing proceedings required.*—If a person is found guilty of murder in the first degree, and if the State had given the notice required under Sec. 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial has been completed to determine whether he shall be sentenced to death or imprisonment for life.

(b) *Before whom proceeding conducted.*—This proceeding shall be conducted:



(1) Before the jury that determined the defendant's guilt; or

(2) Before a jury impaneled for the purpose of the proceeding if:

(i) The defendant was convicted upon a plea of guilty;

(ii) The defendant was convicted after a trial before the court sitting without a jury;

(iii) The jury that determined the defendant's guilt has been discharged by the court for good cause; or

(iv) Review of the original sentence of death by a court of competent jurisdiction has resulted in a remand for resentencing; or

(3) Before the court alone, if a jury sentencing proceeding is waived by the defendant.

(c) *Evidence; argument; instructions.*—(1) The following type of evidence is admissible in this proceeding:

(i) Evidence relating to any mitigating circumstances listed in subsection (g) of this section;

(ii) Evidence relating to any aggravating circumstance listed in subsection (d) of this section of which the State had notified the defendant pursuant to Section 412(b);

(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures;

(iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and

(v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements.

(2) The State and the defendant or his counsel may present argument for or against the sentence of death.

(3) After presentation of the evidence in a proceeding before a jury, in addition to any other appropriate instructions permitted by law, the court shall instruct the jury as to the findings it must make in order to determine whether the sentence shall be death or imprisonment for life and the burden of proof applicable to these findings in accordance with subsection (f) or subsection (h) of this section.

(d) *Consideration of aggravating circumstances.*—In determining the sentence, the court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer who was murdered while in the performance of his duties.

(2) The defendant committed the murder at a time when he was confined in any correctional institution.

(3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

(4) The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

(5) The victim was a child abducted in violation of § 2 of this article.

(6) The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.

(9) The defendant committed more than one offense of murder in the first degree arising out of the same incident.

(10) The defendant committed the murder while committing or attempting to commit a robbery, arson, rape, or sexual offense in the first degree.

(e) *Definitions.*—As used in this section, the following terms have the meanings indicated unless a contrary meaning is clearly intended from the context in which the term appears:

(1) The terms "defendant" and "person", except as those terms appear in subsection (d)(7), include only a principal in the first degree.

(2) The term "correctional institution" includes any institution for the detention or confinement of persons charged with or convicted of a crime, including Patuxent Institution, any institution for the detention or confinement of juveniles charged with or adjudicated as being delinquent, and any hospital in which the person was confined pursuant to an order of a court exercising criminal jurisdiction.

(3) the term "law enforcement officer" has the meaning given in § 727 of Article 27. However, as used in subsection (d), the term also includes (i) an officer serving in a probationary status, (ii) a parole and probation officer, and (iii) a law enforcement officer of a jurisdiction outside of Maryland.

(f) *Finding that no aggravating circumstances exist.*—If the court or jury does not find, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall state that conclusion in writing, and the sentence shall be imprisonment for life.

(g) *Consideration of mitigating circumstances.*—If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:

(1) The defendant has not previously (i) been found guilty of a crime of violence, (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment

entered on a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(3) The defendant acted under substantial duress, domination or provocation of another person, but no so substantial as to constitute a complete defense to the prosecution.

(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

(5) The youthful age of the defendant at the time of the crime.

(6) The act of the defendant was not the sole proximate cause of the victim's death.

(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.

(h) *Weighing mitigating and aggravating circumstances.*—(1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.

(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.

(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life.

(i) *Determination to be written and unanimous.*—The determination of the court or jury shall be in writing, and, if a jury, shall be unanimous and shall be signed by the foreman.

(j) *Statements required in determination.*—The determination of the court or jury shall state, specifically:

(1) Which, if any, aggravating circumstances it finds to exist;

(2) Which, if any, mitigating circumstances it finds to exist;

(3) Whether any mitigating circumstances found under subsection (g) outweigh the aggravating circumstances found under subsection (d);

(4) Whether the aggravating circumstances found under subsection (d) are not outweighed by mitigating circumstances found under subsection (g); and

(5) The sentence, determined in accordance with subsection (f) or (h).

(k) *Imposition of sentence.*—(1) The court shall impose the sentence determined by the jury under subsection (f) or (h).

(2) If the jury, within a reasonable time is not able to agree as to sentence, the court shall dismiss the jury and impose a sentence of imprisonment for life.

(3) If the sentencing proceeding is conducted before a court without a jury, the court shall impose the sentence determined under subsection (f) or (h).

(1) *Rules of procedure.*—The Court of Appeals may adopt rules of procedure to govern the conduct of a sentencing proceeding conducted pursuant to this section, including any forms to be used by the court or jury in making its written findings and determinations of sentence.

(m) *Alternate jurors.*—(1) A judge shall appoint at least 2 alternate jurors when impaneling a jury for any proceeding:

(i) In which the defendant is being tried for a crime for which the death penalty may be imposed; or

(ii) Which is held under the provisions of this section.

(2) The alternate jurors shall be retained during the length of the proceedings under such restrictions and regulations as the judge may impose.

(3) (i) If any juror dies, becomes incapacitated, or disqualified, or is discharged for any other reason before the jury begins its deliberations on sentencing, an alternate juror becomes a juror in the order in which selected, and serves in all respects as those selected on the regular trial panel.

(ii) An alternate juror may not replace a juror who is discharged during the actual deliberations of the jury on the guilt or innocence of the defendant, or on the issue of sentencing.

#### Maryland Code, Article 27, Sec. 414 (1982):

##### § 414. Automatic review of death sentences.

(a) *Review by Court of Appeals required.*—Whenever the death penalty is imposed, and the judgment becomes final, the Court of Appeals shall review the sentence on the record.

(b) *Transmission of papers to Court of Appeals.*—The clerk of the trial court shall transmit to the Clerk of the Court of Appeals the entire record and transcript of the sentencing proceeding within ten days after receipt of the transcript by the trial court. The clerk also shall transmit the written findings and determination of the court or jury and a report prepared by the trial court. The report shall be in the form of a standard questionnaire prepared and supplied by the Court of Appeals of Maryland and shall include a recommendation by the trial court as to whether or not imposition of the sentence of death is justified in the case.



(c) *Briefs and oral argument.*—Both the State and the defendant may submit briefs and present oral argument within the time provided by the Court.

(d) *Consolidation of appeals.*—Any appeal from the verdict shall be consolidated in the Court of Appeals with the review of sentence.

(e) *Considerations by Court of Appeals.*—In addition to the consideration of any errors properly before the Court on appeal, the Court of Appeals shall consider the imposition of the death sentence. With regard to the sentence, the Court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether the evidence supports the jury's or court's finding of a statutory aggravating circumstance under § 413 (d);

(3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and

(4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(f) *Decision of Court of Appeals.*—In addition to its review pursuant to any direct appeal, with regard to the death sentence, the Court shall:

(i) Affirm the sentence;

(ii) Set aside the sentence and remand the case for the conduct of a new sentencing proceeding under § 413; or

(iii) Set aside the sentence and remand for modification of the sentence to imprisonment for life.

(2) The Court shall include in its decision a reference to the similar cases which it considered.

(g) *Rules of procedure.*—The Court may adopt rules of procedure to provide for the expedited review of all death sentences pursuant to this section.

**Maryland Code, Article 41, Sec. 124 (1984 Supp.):**

(a) Whenever any court shall suspend the sentence of any person convicted of crime, and shall direct such person, to continue, for a certain time, or until otherwise ordered, under the supervision of the Division, it shall be the duty of the said Division to supervise, when so requested by said court, the conduct of such person and ascertain and report to said court whether or not the conditions of such probation or suspension of sentence are being faithfully complied with by such person.

(b) The parole and probation agents of the Division shall provide the judge of the court with presentence reports or other investigations in all cases when requested by any judge. The presentence reports are confidential and not available for public inspection except upon court order. However, presentence reports shall be made available, upon request, to the defendant's attorney, the States Attorney, a correctional institution, a parole or probation, or pretrial release official of this State, any other state, the United States, or the District of Columbia, and a public or private mental health facility in any of those jurisdictions, if the individual who is the subject of the report has been committed or is being evaluated for commitment to the facility for treatment as a condition of probation. The agents shall also perform any other probationary services the judge may from time to time request.

(c) (1) Prior to the sentence by the circuit court of any county to the jurisdiction of the Division of Correction of a defendant convicted of a felony, or a misdemeanor which resulted in serious physical injury or death to the victim, or the referral of any defendant to the Patuxent Institution, a presentence investigation shall be completed by the Division of Parole and Probation and considered by the court, unless the court specifically orders to the contrary in a particular case.

(2) (i) The presentence investigation shall include a victim impact statement, if:

1. The defendant, in committing a felony, caused physical, psychological, or economic injury to the victim; or

2. The defendant, in committing a misdemeanor, caused serious physical injury or death to the victim.

(ii) If the court does not order a presentence investigation, the State's Attorney may prepare a victim impact statement to be submitted to the court and the defendant in accordance with the Maryland rules of Procedure pertaining to presentence investigations.

(iii) The court shall consider the victim impact statement in determining the appropriate sentence, and in entering any order of restitution to the victim under Article 27, § 640 (c) of the Code.

(3) A victim impact statement shall:

(i) Identify the victim of the offense;

(ii) Itemize any economic loss suffered by the victim as a result of the offense;

(iii) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;

(iv) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;

(v) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and

(vi) Contain any other information related to the impact of the offense upon the victim or the victim's family that the court requires.

(4) If the victim is deceased, under a mental, physical, or legal disability, or otherwise unable to provide the information required under this section, the information may be obtained from the personal representative, guardian, or committee, or such family members as may be necessary.

(d) In any case in which the death penalty is requested under Article 27, § 412, a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted under Article 27, § 413.

**AMICUS CURIAE**

**BRIEF**



DEC 6 1986

JOSEPH F. SPANGL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

JOHN BOOTH,

*Petitioner,*

v.

STATE OF MARYLAND,

*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT  
OF APPEALS OF MARYLAND

**BRIEF OF *AMICUS CURIAE* NAACP LEGAL  
DEFENSE AND EDUCATIONAL FUND, INC.  
IN SUPPORT OF PETITIONER**

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QUESTIONS PRESENTED

1. Does the admission at a penalty trial of so-called victim impact evidence -- which is by nature inflammatory, irrelevant to any legitimate capital sentencing purpose, and conducive to death sentences imposed on the basis of race, social class, and other impermissible factors -- violate the Eighth and Fourteenth Amendments?

2. Did the introduction at petitioner's sentencing of a "Victim Impact Statement," as mandated under Maryland law, violate this petitioner's rights under the Eighth and Fourteenth Amendments?

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found. It has frequently represented such prisoners before this Court. E.g., Furman v. Georgia, 408 U.S. 238 (1972); Estelle v. Smith, 451 U.S. 454 (1981); Enmund v. Florida, 458 U.S. 782 (1982). The Fund has also appeared before this Court as amicus curiae in capital cases. E.g., Witherspoon v. Illinois, 391 U.S. 510 (1968); Gregg v. Georgia, 428 U.S. 153 (1976); Adams v. Texas, 448 U.S. 38 (1980); Barefoot v. Estelle, 463 U.S. 880 (1983).

The Legal Defense Fund currently represents a substantial number of indigent condemned prisoners in states in the Fourth Circuit and elsewhere, whose cases are at various stages following affirmance of conviction and sentence by the state appellate courts. The Fund is also often called on, and tries to the extent of its capacities, to provide consultative assistance to attorneys representing other capital defendants across the nation.

The issues presented by this case are of utmost concern to death-sentenced prisoners throughout the country, including many represented by the Fund. Both petitioner and respondent have consented to the filing of this amicus curiae brief.

#### SUMMARY OF ARGUMENT

I. The admission of victim impact evidence at penalty trials violates the Eighth and Fourteenth Amendment rights of defendants on trial for their lives on a number of grounds. For one thing, its use advances no legitimate goal of capital sentencing. Further, because it is so inflammatory, it deflects the jurors from rational consideration of the life-or-death decision. Toleration of this evidence would, moreover, compel admission of wide-ranging proof of a similar nature offered by defendants, and thereby threaten the entire structure of death-sentencing

jurisprudence the Court has erected. Finally, victim impact evidence encourages jurors to base determinations of death on invidious, impermissible factors such as race and social class.

II. In this case, the "Victim Impact Statement" admitted at the penalty trial was so inflammatory and irrelevant as clearly to violate petitioner's rights under the Eighth and Fourteenth Amendments.

#### ARGUMENT

##### I.

THE USE OF "VICTIM IMPACT" EVIDENCE AT THE PENALTY PHASE OF A CAPITAL TRIAL, AS MANDATED UNDER MARYLAND LAW, INJECTS IRRATIONAL, ARBITRARY AND IMPERMISSIBLE CONSIDERATIONS INTO THE LIFE-OR-DEATH DECISION, AND IS UNCONSTITUTIONAL.

Both in ushering out the old era of capital punishment, Furman v. Georgia, 408 U.S. 238 (1972), and in inaugurating the new, see, e.g., Gregg v. Georgia, 428 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976), the Court announced a

strong commitment to eradicating arbitrary and invidious influences on death-penalty determinations. That commitment persists unabated. As recently as last Term's decision in Turner v. Murray, \_\_ U.S. \_\_, 90 L.Ed.2d 27 (1986), the Court reaffirmed its obligation to strike down death sentences imposed under circumstances that "'created an unacceptable risk'" of arbitrariness, caprice or mistake. Id. at 36, quoting Caldwell v. Mississippi, \_\_ U.S. \_\_, 86 L.Ed.2d 231, 248-49 (1985) (O'Connor, J., concurring in part and concurring in the judgment).

So-called victim impact evidence, which in capital penalty proceedings mainly deals with effects of the crime on the victim's family<sup>1</sup>, offends this principle

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<sup>1</sup>Lodowski v. State, 302 Md. 691, 760-61, 490 A.2d 1228, 1263 (1985) (Cole, J., concurring), vacated on other grounds, \_\_ U.S. \_\_, 89 L.Ed. 2d 711 (1986). More detailed discussions of such evidence appear at pp. 40-45, infra.

for four interrelated reasons.<sup>2</sup> First, such evidence intrudes into the penalty decision considerations that have no rational bearing on any legitimate aim of capital sentencing. Second, this proof is highly emotional and inflammatory, subverting the reasoned and objective inquiry which this Court has required to guide and regularize the choice between death and lesser punishments. Third, victim impact evidence cannot conceivably be received without opening the door to proof of a similar

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<sup>2</sup>The Court need not now determine the appropriate role, if any, of the victim or the victim's family at various stages of ordinary trials. See generally Henderson, The Wrongs of Victim's Rights, 37 Stan. L.Rev. 937 (1985); see, e.g., Pub. L. No. 97-291, 96 Stat. 1248 (1982) (amending Fed. R. Crim. P. 32(c)(2)). For, as the Court has often recognized: "... [T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." Turner, \_\_ U.S. at \_\_, 90 L.Ed.2d at 36, quoting California v. Ramos, 463 U.S. 992, 998-99 (1983). See also Woodson v. North Carolina, 428 U.S. at 303-05 (opinion of Stewart, Powell and Stevens, JJ.).

nature in rebuttal or in mitigation, further upsetting the delicate balance that the Court has painstakingly achieved in this area. Fourth, the evidence invites the jury to impose death sentences on the basis of race, class, and other clearly impermissible grounds.

1. Much of the Matter Required by Maryland Law to Be Included in Victim Impact Statements Bears No Conceivable Relationship to the Legitimate Ends of Capital Sentencing.

Article 41, section 124 of the Maryland Code, set out in pertinent part in the margin,<sup>3</sup> provides for a Victim Impact

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<sup>3</sup>Section 124(c)(3), (4) and (d) read as follows (emphasis added):

- (c) ...  
(3) A victim impact statement shall:  
(i) Identify the victim of the offense;  
(ii) Itemize any economic loss suffered by the victim as a result of the offense;  
(iii) Identify any physical injury suffered by the victim as a result of the offense along



Statement ("VIS") to be encompassed in the presentence investigation. Originally enacted in 1982, the law did not apply at first to felonies that resulted in death.

with its seriousness and permanence;

(iv) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;

(v) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and

(vi) Contain any other information related to the impact of the offense upon the victim or the victim's family that the court requires.

(4) If the victim is deceased, under a mental, physical, or legal disability, or otherwise unable to provide the information required under this section, the information may be obtained from the personal representative, guardian, or committee, or such family members as may be necessary.

(d) In any case in which the death penalty is requested under Article 27, section 412, a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted under Article 27, §413.

See Lodowski v. State, 302 Md. at 736-37 & n.4, 490 A.2d at 1251-52; id., 302 Md. at 760-63 & n.4, 490 A.2d at 1263-65 & n.4 (Cole, J., concurring) (discussing legislative history). The next year, the statute was amended, in haste and apparently without much thought, to require preparation and consideration by the sentencing body of a VIS in any case where the death penalty is requested (but not in other murder prosecutions). <sup>4</sup>

<sup>4</sup>About 30 states have recently passed statutes authorizing victim input, in the form of statements or otherwise, in sentencing proceedings. Lodowski v. State, 302 Md. at 754-55 & n.3, 490 A.2d at 1260 n.3 (Cole, J., concurring) (listing statutes). Most of these jurisdictions have also enacted capital punishment provisions. A number of states with both victim impact and death-penalty legislation expressly exclude capital sentencing from the ambit of the former statutes. See, e.g., L.S.A. Code Crim. Pro., art. 875(A),(B) (1984) (La.); O.C.G.S. sections 17-10-1.1, 17-10-1.2 (Supp. 1986) (Ga.); Okla. Stat. Ann. tit. 22, section 982 (1986); S.C. Code Ann. section 16-3-1550(A) (1985); but see Md. Code, art. 41, section 124 (Cum Supp. 1984); Neb. Rev. Stat. section 29-2261 (1985); State v. Williams, 217 Neb. 539, 541-42, 352 N.W.2d

Section 124 now calls for a VIS describing specific harms to the victim: economic, physical and emotional. The statute also expressly mandates inclusion in the statement of certain information regarding the family. For instance, the VIS must "[d]escribe any change in the victim's personal welfare or familial relationships" and "[i]dentify any request for psychological services initiated by the victim or the victim's family that the court requires." Md. Code, art. 41, section 124(c)(3)(iv), (v), (vi)(emphasis added). Where the victim is deceased, a separate subheading explicitly provides for the needed data to be gotten "from the personal representative, guardian, or committee, or such family members as may be

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538, 540-41 (1984) (presentence report admissible at penalty trial); State v. Reeves, 216 Neb. 206, 221, 344 N.W.2d 433, 444 (1984)(per curiam)(same). See generally Henderson, supra note 2, at 986-87.

necessary." Id. (c)(4)(emphasis added). See generally supra note 3. If one considers how, practically speaking, such a statute applies in a capital murder case, it is readily apparent why admission of a VIS or similar impact evidence<sup>5</sup> at sentencing is "fraught with constitutional danger." See Moore v. Zant, 722 F.2d 640, 646 (11th Cir. 1983), reh'g en banc granted, 738 F.2d 1126 (11th Cir. 1984).

Every murder trial includes, as part of the prosecution's case, the fact that a particular victim has died and the extent

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<sup>5</sup>Because victim impact legislation is of recent origin, see supra note 4, the statutes themselves have generated few reported cases. Even in the absence of statutes, however, proof of this type has at times been offered in capital and non-capital trials, and courts have passed upon its propriety. See, e.g., People v. Free, 94 Ill.2d 378, 447 N.E. 2d 218, cert. denied, 464 U.S. 865 (1983); Muckle v. State, 233 Ga. 337, 211 S.E.2d 361 (1974); People v. Levitt, 156 Cal.App.3d 500, 203 Cal.Rptr. 276 (1984). Examples of experience with similar evidence elsewhere illuminate the problems of the Maryland law, and are accordingly included here.



of his or her injuries. The killing is an element of the crime charged, and proof of injuries is typically relevant to intent and other issues of mens rea as well as to the means employed.<sup>6</sup> Further, special facts about the victim which aggravate the crime when known to the killer -- such as the victim's status as a policeman on duty or vulnerable child or elderly person-- will naturally emerge during trial; they will be highlighted in the penalty phase where a state has chosen to make them statutory aggravating circumstances. If a VIS is to have any significance, it would rest on the contents of the statement over and above all of this information. The matter, not bearing on the crime or the defendant's mental state in relation to it, is, of course, what this case is about.

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<sup>6</sup>E.g., certain kinds of wounds, consistent with the close-range firing of a gun, would tend not only to prove the instrumentality of death but also, ordinarily, intent to kill.

Typically, those parts of the VIS that go beyond the evidence at trial portray grief-stricken relatives expressing their extreme sorrow, sense of loss, and anger over their bereavement -- often in highly emotional terms. Sometimes, these survivors call, explicitly or implicitly (as here), for the death of the perpetrator, or announce their impatience with procedures and delays in the courts. They relate somatic and psychological symptoms of distress attributed by them to the murder, such as physical ailments, effects on pregnancy, lack of appetite, sleeplessness, nightmares, fears and depression. Frequently, too, the adult survivors describe these conditions in their children.<sup>7</sup>

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<sup>7</sup>Samples of all the varieties of proof detailed in this paragraph and the next appear both in Booth, 306 Md. 172, 234-39, 507 A.2d 1098, 1130-33 (1986), and in Maryland's leading case on victim impact evidence, Lodowski v. State, 302 Md. at 764-72, 780-84, 490 A.2d at 1265-70, 1273-



Insofar as the VIS recounts matter pertaining to the actual victim, that too, ordinarily, has no bearing on the circumstances of the crime or the defendant. Frequently, (as here), family members were not present at the time of the killing and have no relationship with the killer. Hence, they tend to dwell upon general good character traits and achievements of the deceased, see, e.g., Moore v. Zant, supra (victim's education and work habits), and recollections of "happier days." See, e.g., Lodowski, 302 Md. at 770 n.8, 490 A.2d at 1268 n.8 (Cole, J., concurring)(topic heading in victim's mother's VIS was entitled "'Our Past Happy Days'"); Tobler v. State, 688 P.2d 350 (Okla. Crim. App. 1984)(surprise Mother's Day family reunion involving the victim).

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76 (Cole, J. concurring). See also infra at 40-45; Petitioner's Brief at \_\_\_\_ (Statement of the Case).

Such proof at a penalty trial fails to contribute "measurably" -- or at all -- to the recognized aims of capital sentencing, which, as the Court has often stated, are mainly retribution and general deterrence. See, e.g., Enmund v. Florida, 458 U.S. 782, 798 (1982); Gregg v. Georgia, 428 U.S. at 183 (opinion of Stewart, Powell and Stevens, JJ.); see also id. at 233 (Marshall, J., dissenting). These aims explain why capital punishment decisions since Gregg constantly recur to the theme of "personal responsibility and moral guilt," Enmund v. Florida, 458 U.S. at 801, and hence to the constitutional requirement that the life-or-death decision focus on "relevant facets of the character and record of the individual offender" and "the circumstances of the particular offense." Id. at 798; Woodson v. North Carolina, 428 U.S. at 304 (opinion of Stewart, Powell and Stevens, JJ.). See, e.g., California v.

Ramos, 463 U.S. at 1006; Zant v. Stephens, 462 U.S. 862, 879 (1983); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion); Gregg, 428 U.S. at 189 (opinion of Stewart, Powell and Stevens, JJ.). For Enmund v. Florida, *supra*, in barring the infliction of death upon a vicarious felony murderer who did not intend any killing to occur, made clear that both the retributive and the deterrent efficacy of capital punishment depend critically on the degree of a defendant's culpability and, above all, his intent -- considerations built into the death-selection standard revolving about the crime and the criminal. *See id.*, 458 U.S. at 799-801. Executing a defendant on the basis of results over which he had no control and which he did not contemplate neither "educates" future offenders nor

constitutes "just deserts" for the actions of this particular offender.<sup>8</sup>

Unintended physical, emotional and psychological after-effects on relatives do not increase the moral blameworthiness of the killer beyond the onus he already bears for committing the murder, and are "constitutionally irrelevant." *See California v. Ramos*, 463 U.S. at 1001-02 (footnote omitted); Zant v. Stephens, 462 U.S. at 885. Since "the fact that a victim's family is irredeemably bereaved can be attributable to no act of will of the defendant other than" the killing, meting out death on account of "fortuitous circumstances" like "the composition of the

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<sup>8</sup>Even if specific deterrence or incapacitation of the killer (preventing his commission of further crimes) were thought to justify capital punishment, *cf. Gregg*, 428 U.S. at 183 n.28 (opinion of Stewart, Powell and Stevens, JJ.) (taking no position on the question), achievement of these aims, too, would involve assessment of factors relating to the crime or the criminal.

Cal. App.3d at 516-17, 203 Cal. Rptr. at 287-88, or survivors' need for "psychological services," Lodowski, 302 Md. at 764 n.6, 490 A.2d at 1265 n.6, 1267 (Cole, J., concurring); see Md. Code, art. 41, section 124(c)(3)(v), does not further deterrence or retribution. Indeed:

It would be difficult to find anything less relevant to the circumstances of this offense or the character of this defendant than testimony concerning the reactions of family members of his unfortunate victims. Their reaction was not to the nature of his crime but to the fact that the crimes happened.

People v. Free, 94 Ill. 2d at 436, 447 N.E.2d at 246 (Simon, J., concurring in part and dissenting in part). Similarly, proof of the victim's sterling character ordinarily has no legitimate place at a capital trial and serves only to inflame the jury. See, e.g., People v. Holman, 103 Ill.2d 133, 166-67, 469 N.E. 2d 119, 134-

35 (1984), cert. denied, 469 U.S. 1220 (1985).<sup>9</sup>

In Lodowski, on which the Maryland Court of Appeals relied in Booth, the majority cursorily equated victim impact evidence with the "circumstances surrounding the crime" and therefore deemed it admissible. 302 Md. at 741-42, 490 A.2d at 1254. This argument is wholly unpersuasive. Lodowski, 302 Md. at 774, 490 A.2d at 1270 (Cole, J., concurring). Cf. Moore v. Zant, 722 F.2d at 653 n.3 (Kravitch, J., concurring in part and

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<sup>9</sup> In certain limited situations, facts concerning the victim's character may be relevant to guilt or innocence, or to the degree of the defendant's personal culpability, and hence admissible at capital trials as at others. See generally Fed. R. Evid. 404(a)(2) (permissible for state to show peaceable nature of victim to rebut evidence offered by defendant to prove victim was first aggressor). Compare Moore v. Zant, 722 F.2d at 645 (victim's character bore on existence of an aggravating circumstance) with id. at 651 (Kravitch, J., concurring and dissenting) (contra).



dissenting in part)("pure sophistry" to subsume victim's "positive attributes" under "'circumstances of the crime'").<sup>10</sup> On the one hand, to the extent that after-effects are idiosyncratic, like the blighting influence on a granddaughter's wedding of the murder involved in this case (JA \_\_\_\_), such an expansive conception of "crime" suggests no principled outer limits germane to culpability. Cf. Evans v. State, 422 So.2d 737, 743-44 (Miss. 1982)(error in admitting proof of victim's wife's pregnancy, unknown to defendant, at capital sentencing was cured by instruction). On the other hand, as to predictable effects -- the likelihood, for

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<sup>10</sup>By contrast, aggravating circumstances such as killing a victim who is known to be an on-duty police officer or especially vulnerable, see supra at 12, genuinely relate to the nature of the offense. See Moore v. Zant, 722 F.2d at 652 n.2 (Kravitch, J., concurring in part and dissenting in part); People v. Levitt, 156 Cal. App. 3d at 516-17, 203 Cal. Rptr. at 287-88.

instance, that someone will mourn the victim's loss -- their very generality defeats the goal of individualization in sentencing. See, e.g., Zant v. Stephens, 462 U.S. at 879; Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982). In any event, Enmund made clear that the death penalty cannot be grounded on broad notions of responsibility for all foreseeable results of one's acts:<sup>11</sup> death imposed on such a

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<sup>11</sup>A pre-Furman state court decision, People v. Love, 53 Cal.2d 843, 350 P.2d 705, 3 Cal. Rptr. 665 (1960)(Traynor, CJ.), is very instructive in this regard. There, the court vacated a capital sentence because the state had presented proof of the victim's extreme pain, in the absence of any showing that the killer had intended to make her suffer when he shot her fatally at point-blank range. Operating under a system where (unlike now) the jury possessed "complete discretion" to assess sentence, and conceding that "retribution may be a proper [sentencing] consideration," the court nonetheless expressed strong doubt "that the penalty should be adjusted to the evil done without reference to the intent of the evildoer." 53 Cal.2d at 856-57 & n.3, 350 P.2d at 712-13 & n.3, 3 Cal. Rptr. at 672-73 & n.3.

basis<sup>12</sup> amounts to "'nothing more than the purposeless and needless imposition of pain and suffering'" and thus to "unconstitutional punishment." See Enmund, 458 U.S. at 798, quoting Coker v. Georgia, 433 U.S. 584, 592 (1977).

2. By Deflecting the Jury From Its Proper Task of Objectively Considering the Particularized Circumstances of the Individual Offender and Crime, Introduction of Victim Impact Statements at the Penalty Phase Encourages Arbitrary Sentences of Death.

If a state wishes to authorize capital punishment, it "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v.

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<sup>12</sup>Cf. Gardner v. Florida, 430 U.S. 349, 359 (1977): "If, as the State argues, it is important to use such information in the sentencing process, we must assume that in some cases it will be decisive in the [sentencer's] choice between a life sentence and a death sentence."

Georgia, 446 U.S. 420, 428 (1980) (plurality opinion) (citations omitted). Although the jury should have as much relevant data as possible to inform its choice, Gregg, 428 U.S. at 204 (opinion of Stewart, Powell and Stevens, JJ.); see Zant v. Stephens, 462 U.S. at 878, "[i]t would be erroneous to suggest that the Court has imposed no substantive limitations on the particular factors that a capital sentencing jury may consider in determining whether death is appropriate." California v. Ramos, 463 U.S. at 1000. Critically, evidence that introduces arbitrary variables into the life-or-death decision affronts the central constitutional tenet that a capital sentence must be "'based on reason'" -- in appearance and reality-- "rather than caprice or emotion." Zant v. Stephens, 462 U.S. at 885, quoting Gardner v. Florida, 430 U.S. at 358. See also People v. Love, 53 Cal. 2d at 856, 350 P.2d

at 713, 3 Cal. Rptr. at 673 (pre-Furman case)).

Because Victim Impact Statements and similar forms of evidence virtually invite jurors to sentence on the basis of "'passion, prejudice or ... other arbitrary factor[s]'," no civilized system should sanction their use at the penalty phase of capital trials. Cf. Gregg, 428 U.S. at 166-67, 198 (opinion of Stewart, Powell and Stevens, JJ.) (upholding Georgia's capital statutes in part because appellate review minimized the influence of these factors). Judge Cole, the dissenter on this point in Booth, captured the essence of the dangers posed to rational sentencing by such innately inflammatory evidence in his concurrence in Lodowski:

In my view, the only purpose in allowing members of the victim's family in a capital sentencing proceeding to vent their passions and express their grief, as in this case, is to exacerbate the aggravating circumstances

established by the prosecution. These demonstrations are arbitrary and capricious and create a frenzied environment for the defendant. How can he challenge any testimony that expresses bereavement, religious harm, or infant sorrow?

Id., 302 Md. at 786, 490 A.2d at 1276-77.<sup>13</sup>

<sup>13</sup>Opinions in several capital cases from other jurisdictions articulate compatible views. See, e.g., People v. Ramirez, 98 Ill.2d 439, 453, 457 N.E.2d 31, 37 (1983) (citation omitted):

"[E]vidence that a murder victim has left a spouse or children is inadmissible since it does not enlighten the trier of fact as to the guilt or innocence of the defendant or the punishment he should receive, but only serves to prejudice and inflame the jury."

See also People v. Free, 94 Ill.2d at 436, 447 N.E.2d at 246 (Simon, J., concurring in part and dissenting in part):

An emotional rendition of the grief of a victim's family, while understandable, can only distract the jury from its weighing of the aggravating and mitigating factors



Several states have apparently recognized these risks, and responded to them sensitively, by exempting capital penalty trials from the requirements of victim input laws. See supra note 4. In the absence of governing statutes too, courts have disapproved the use in capital proceedings of testimony designed mainly to create sympathy for the victim or his or her family, and simultaneously to generate hatred toward the defendant. See, e.g., People v. Holman, 103 Ill.2d at 166-67, 469 N.E.2d at 134-35; Ice v. Commonwealth, 667 S.W.2d 671, 675-76 (Ky.), cert. denied, 469 U.S. 861 (1984); Wiley v. State, 464 So.2d 339, 348 (Miss. 1986); Tobler v. State, 688

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peculiar to the defendant and his crime. Such testimony is always inflammatory.

Cf. Fuselier v. State, 468 So.2d 45 (Miss. 1985)(reversal of conviction and death sentence because victim's daughter was permitted to sit near the prosecutor and openly displayed emotion).

P.2d at 353-54; cf. Vela v. Estelle, 708 F.2d 954, 964-65 (5th Cir. 1983)(because of counsel's ineffectiveness, jury had been encouraged "to set punishment based on the goodness of the murder victim"), cert. denied, 464 U.S. 1053 (1984).

Such rulings, whether or not expressly premised on the Eighth Amendment, effectuate its mandate to avert the risk of death sentences based on "caprice or emotion." See Gardner v. Florida, 430 U.S. at 358.<sup>14</sup> They are bolstered by an

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<sup>14</sup>This mandate in no way conflicts with the defendant's position in People v. Brown, 40 Cal.3d 512, 709 P.2d 440, 220 Cal. Rptr. 637 (1985), cert. granted, \_\_\_ U.S. \_\_\_, 90 L.Ed.2d 717 (1986), challenging a penalty-phase instruction that the jury should not be swayed by sympathy. The California Supreme Court had previously held that a jury may not rely upon factually untethered sympathy -- i.e., sympathy not based on the evidence. People v. Lanphear, 36 Cal.3d 163, 168 n. 1, 680 P.2d 1081, 1084 n. 1, 203 Cal. Rptr. 122, 125 n.1 (1984); see People v. Easley, 34 Cal. 3d 858, 876 671 P.2d 813, 824, 196 Cal. Rptr. 309, 320 (1983). In Brown, the defendant produced substantial mitigating evidence relating to his character and background, as he was clearly entitled to

additional line of precedent that holds inadmissible victim-character or generalized victim-sympathy proof -- as irrelevant or overly inflammatory -- even without regard to the special considerations obtaining in capital sentencing proceedings. See, e.g., People v. Levitt, 156 Cal. App.3d at 517, 203 Cal. Rptr. at 288 (family's bereavement irrelevant to sentence of a defendant convicted of manslaughter); Henderson v. State, 234 Ga. 827, 828, 218 S.E.2d 612, 614 (1975)(generally, murder victim's

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do (see, e.g., Skipper v. South Carolina, U.S. \_\_\_, 90 L.Ed.2d 1 (1986); Lockett v. Ohio, supra); the sole issue dividing the parties is whether the no-sympathy instruction foreclosed the jurors' consideration of this evidence, whose relevance no one disputes. See Brief for Respondent in People v. Brown, supra, at 9-10, 24.

Here, by contrast, the issue is precisely the relevance of evidence entirely unrelated to the character or background of a defendant or to his crime, but instead dealing only with collateral facts about a victim or surviving relatives.

character is irrelevant and inadmissible in a murder trial); Fisher v. State, 482 So.2d 203, 225 (Miss. 1985) (en banc) (same); Welty v. State, 402 So.2d 1159, 1162 (Fla. 1981) (preference for non-family member testimony, whenever feasible, to identify the deceased); cf. State v. Sprake, 637 S.W.2d 724, 727 (Mo. Ct. App. 1982) (in second-degree murder case, error to call widow solely to expose her to jury, to engender sympathy for the family and prejudice against the defendant); People v. Bartall, 98 Ill.2d 294, 322-23, 456 N.E.2d 59, 72-73 (1983) (prosecutor's summation on victim's rights held improper but harmless, in part because there had been "no presentation of irrelevant evidence about the grieving family"); Grant v. State, 703 P.2d 943, 945-47 (Okla. Crim. App. 1985)(prosecutor's statement that manslaughter victim was survived by eleven-

year old daughter held to be error although harmless).<sup>15</sup>

Simply stated, courts have sought to avoid the dangers of exposing juries to emotion-laden evidence of dubious or non-existent relevance, both in capital and ordinary trials. Whether or not the Constitution requires this caution in non-capital cases, see supra note 2, it is "essential in capital cases," Lockett v. Ohio, 438 U.S. at 605, where the Eighth and Fourteenth Amendments demand the highest degree of protection against subjectivity and prejudice. E.g., Gardner v. Florida, supra; Turner v. Murray, supra.

<sup>15</sup>Of course, under certain circumstances, evidence of the victim's character, good or bad, may bear sufficiently on issues pertinent to the trial to be admissible. See supra note 9. However, it is hard to envision any setting, in a criminal case, in which such matters as survivors' sorrow or physical or psychological symptoms are relevant. Cf. People v. Levitt, 156 Cal. App. 3d at 157, 203 Cal. Rptr. at 288 (evidence of this sort "is relevant to damages in a civil action").

### 3. Admission of Victim Impact Evidence Would Necessitate Admission of Expansive Proof of a Similar Type, Offered On Behalf of Defendants.

A holding by the Court tolerating victim impact evidence would necessarily expand the scope of future penalty trials beyond all reason. For if the Court gives its imprimatur to a wholly new definition of relevance in capital sentencing -- a definition loosed from the traditional moorings of the defendant's character, background and crime -- it must also deem relevant in mitigation proof whose reach will be bounded only by the inventiveness of counsel.

Take as an instance the subject of the victim's character. What principle of logic or fairness could deem it relevant that the deceased was a good person and at the same time irrelevant that he or she was bad? Were the state permitted to prove that a victim was educated and hard-working, a defendant should be permitted to



show that a victim was a sixth-grade dropout, who never worked a day in his life. Similarly, if it "matters" in the context of capital sentencing that one victim left a family who loved her, it also "matters" that another was hated by surviving relatives -- or, indeed, left no family at all. A defendant cannot constitutionally be foreclosed from offering evidence pertinent to the issues in a criminal trial, see, e.g., Chambers v. Mississippi, 410 U.S. 284 (1973), and the same rule applies at the penalty phase of a capital case. See, e.g., Green v. Georgia, 442 U.S. 95 (1979)(per curiam).<sup>16</sup>

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<sup>16</sup>Where the prosecution has presented evidence enhancing the victim, there can simply be no way to avoid the conclusion that the defendant has a Fourteenth Amendment right to "'deny or explain'" it, by proving, e.g., that the victim was unworthy or unmourned. See, e.g., Skipper v. South Carolina, \_\_\_ U.S. at \_\_\_ n. 1, 90 L.Ed.2d at 7, n. 1; \_\_\_ U.S. at \_\_\_, 90 L.Ed.2d at 9-11 (Powell and Rehnquist, JJ., and Burger, CJ., concurring in the judgment) (capital defendant denied due process when he was barred from adducing

But if the spectacle of the defendant "trashing" the victim through proof and argument seems inappropriate, consider the further prospect of competing "victims" at penalty trials. Suppose, for example, that the Court sanctions introduction of a VIS containing (as here) graphic descriptions by family members of how the murder has destroyed their lives and thrown them into emotional turmoil. This very case, reveals the type of "contest of weeping families" that would predictably follow. In exercising his right under Maryland law to make an unsworn statement to the jury, Booth sought to portray his family as victims:

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evidence of his good behavior in custody to counter argument by prosecution that he would be a dangerous prisoner), quoting Gardner v. Florida, 430 U.S. at 362; see generally id. (due process violation where defendant was sentenced to death in part on the basis of confidential information, "which he had no opportunity to deny or explain").

Now this case, it has had a terrible effect on me and my family and particularly my wife. My wife has attempted suicide. My grandfather had a stroke. He's past [sic] away. He's deceased now as a result of me facing a death penalty in this case.

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The effect of this thing on my grandmother has been hard. She is under doctor's care. She has heart problems and I think that if I am sentenced to death, that woman would actually die. I know it.

(JA \_\_; see also JA \_\_). The prosecution did not object to these comments--possibly because state law permits "allocution" by defendants on matters not confined to the record. See Booth, 306 Md. at 197-99, 507 A.2d at 1111 (discussing Md. Rule 4-343 (d)). It would seem, however, that once VIS evidence of the sort admitted against Booth is permitted, the defendant must have the constitutional right to

present sworn statements or testimony by parents, grandparents, children and siblings to describe in detail their own physical and psychological "victimization," which could be expected to result from their loved one's execution.<sup>17</sup> If the deceased's weeping mother has a role to play at sentencing, by the same token so must the defendant's: either such feelings properly enter the capital calculus or they do not. Yet to sanction such proof would

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<sup>17</sup>Nothing in the Eighth Amendment compels admission of such collateral evidence, untethered to proof about the defendant's own better qualities. See, e.g., Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979) (no error in excluding evidence of adverse effects on defendant's children of his prosecution for capital murder since it was irrelevant to mitigation), cert. denied, 444 U.S. 1103 (1980); see generally Skipper v. South Carolina, \_\_ U.S. at \_\_, 90 L.Ed.2d at 6, 8 n.2. See also Moore v. Zant, 722 F.2d at 653 n.4 (defendant should not be permitted "to argue the victim's worthlessness in mitigation"); State v. Gaskins, 284 S.C. 105, 128, 326 S.E.2d 132, 145 (1985) (no error in excluding confession of victim, a murderer under sentence of death, since victim's status "did not entitle [defendant] to kill him").

be tantamount to toppling the entire edifice of rational capital sentencing jurisprudence which the Court has taken such pains to erect.

4. Victim Impact Statements Invite the Jury to Impose Sentences of Death for Constitutionally Impermissible Reasons.

Worse, if possible, than death sentences that are entirely arbitrary in the sense that a strike of lightning is freakish, see Furman, 408 U.S. at 309-10 (Stewart, J., concurring), are those imposed on invidious grounds: where the lightning rod is race, religion, class or wealth, or some other constitutionally forbidden criterion. See Zant v. Stephens, 462 U.S. at 885; Furman, 408 U.S. at 249-51 (Douglas, J., concurring); id. at 310 (Stewart, J., concurring); id. at 363-66 (Marshall, J., concurring); Moore v. Zant, 722 F.2d at 645-46. In addressing the necessarily capricious quality of victim

impact evidence, Judge Cole once again gave eloquent voice to the basic problems:

What can be a more arbitrary factor in the decision to sentence a defendant to death than the words of the victim's family, which vary greatly from case to case, depending upon the ability of the family member to express his grief, or even worse depending upon whether the victim has family at all? In more practical terms, a killer of a person with an educated family would be put to death, whereas in a crime of similar circumstances, the killer of a person with an uneducated family or one without a family would be spared.

Booth, 306 Md. at 233, 507 A.2d at 1129 (Cole, J., concurring in part and dissenting in part). It is no great leap from the judge's perception of the arbitrariness of the listed factors to an understanding that these -- and others-- have a highly discriminatory potential.



This is so for a number of reasons. First, such characteristics as the articulateness of family members will often be the products of class or wealth, thereby serving as surrogates for impermissible status considerations that no one would claim should influence capital sentencing.<sup>18</sup> Further, not only the mode of expression but also its substance typically encourages the jurors to consider the social value of the victim and "compare the relative worth of the victim and the defendant to society."<sup>19</sup> See Brooks v. Kemp, 762 F.2d 1383, 1439 (11th Cir. 1985)

<sup>18</sup>It is instructive in this regard to compare the power of expression of the VIS in Booth, see infra at 40-45, with petitioner's admitted sense of inadequacy in allocution: "I've never been a real good speaker in front of people or anything like that. I'm not gifted with words or nothing like that." (JA \_\_\_\_).

<sup>19</sup>Cf. Moore v. Zant, 722 F.2d at 653 n.4 (Kravitch, J., concurring in part and dissenting in part)(invoking "spectre" of statute listing as aggravating factor that "victim of the murder was a valuable member of society and of her family").

(en banc) (Clark, J., concurring in part and dissenting in part), vacated on other grounds, \_\_\_\_ U.S. \_\_\_\_, 92 L.Ed.2d 732 (1986); Moore v. Zant, 722 F.2d at 652-53 (Kravitch, J., concurring in part and dissenting in part). Social worth, as the jurors view it, will also tend to vary with factors like education, class and wealth, whether of the victim or the survivors--and, regrettably, often with race or religion as well. See, e.g., People v. Holman, 103 Ill. 2d at 167-68, 469 N.E.2d at 135 (death sentence vacated where prosecutor alluded to "religious moral fiber" of victim's mother as well as accomplishments of victim); see generally Turner v. Murray, supra (especially great risk of racial discrimination in capital sentencing). By its very nature, this type of evidence invites the jury to "choose up sides," to empathize with the (usually more attractive) victim or the victim's family,

in particular where these are white, middle-class, and otherwise similar to most of the jurors.

## II.

THE ADMISSION AT PETITIONER'S  
PENALTY TRIAL OF A LONG,  
IRRELEVANT, INFLAMMATORY VICTIM  
IMPACT STATEMENT VIOLATED  
PETITIONER'S RIGHTS UNDER THE  
EIGHTH AND FOURTEENTH AMENDMENTS.

Agent Michelle Swann of the Division of Parole and Probation prepared a four-page, single-spaced VIS in this case, reporting the reactions of the victims' son, daughter, son-in-law, and one granddaughter. The statement is fully set out in the Joint Appendix (JA \_\_\_\_ ) and is excerpted in Petitioner's Brief. See id. at \_\_\_\_ (Statement of the Case). For present purposes, a small sampling of the data contained within this document -- which the prosecutor in his closing urged the jurors to "read out loud" in the jury room-- provides a graphic illustration of why this

kind of proof is anathema to rational capital sentencing.<sup>20</sup>

First, the VIS was replete with emotional and incendiary comments. For example: "'The victims' son feels that his parents were not killed but were butchered like animals'." (JA \_\_\_\_). The victims' daughter "'saw the bloody carpet, knowing that her parents had been there, and she felt like getting down on the rug and holding her mother'." (JA \_\_\_\_). "'[S]he could never forgive anyone for killing them that way'" and "'states that animals wouldn't do this'." (JA \_\_\_\_).

Interspersed among such remarks were statements amounting to calls for a death

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<sup>20</sup>Booth, 306 Md. at 240, 507 A.2d at 1133 (Cole, J., concurring in part and dissenting in part)(emphasis in original). In light of the prosecutor's exhortation and the fact that the VIS (and the rest of the presentence investigation report) comprised the entire state's case at sentencing, 306 Md. at 194, 507 A.2d at 1109, the use of this grossly inflammatory statement could not have amounted to harmless error.

sentence,<sup>21</sup> expressions of sentiments of revenge, and implicitly adverse judgments about the course of the prosecution. The daughter, for instance, "'attended the defendant's trial and that of the co-defendant because she felt someone should be there to represent her parents'." (JA \_\_\_\_). "'She doesn't feel that the people who did this would ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this'." (JA \_\_\_\_). The son "'doesn't think anyone should be able to do something like this and get away with it'." (JA \_\_\_\_). Further,

"the victims' family members note that the trials of the suspects charged with these offenses have been delayed for over a year and the postponements have been very

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<sup>21</sup>Introduction of sentencing recommendations in a capital penalty trial is forbidden by Maryland law. Md. Code, art. 27, section 413(c)(iv). See Lodowski, 302 Md. at 775, 490 A.2d at 1271 (Cole, J., concurring).

hard on the family emotionally.... The family wants the whole thing to be over with and they would like to see swift and just punishment."

(JA \_\_\_\_)(emphasis added).

In addition to quoting more comments of a similar nature, the VIS recounted the various physical and psychological problems experienced by the interviewees as well as by other members of the family. The statement noted, for instance, that a granddaughter with whom the agent had not spoken had had her wedding, honeymoon and associated memories ruined by the tragic events of the time (JA \_\_\_\_); different grandchildren (also not interviewed by the agent) were poignantly reported as having first learned of their grandparents' death via television. (JA \_\_\_\_).

The VIS also described the victims in extremely laudatory terms as "'amazing'" people, who enjoyed a "'very close relationship'," "'had made many devout



friends'" (JA \_\_\_\_), and whose funeral was "'the largest in the history'" of the funeral home. (JA \_\_\_\_). Finally, it contained editorial comments by Agent Swann<sup>22</sup> and global statements by the

<sup>22</sup>See, e.g.: "'Perhaps [the granddaughter] described the impact of the tragedy most eloquently when she stated that it was a completely devastating and life altering experience'." (JA \_\_\_\_). The agent's "peroration," with which the VIS ended, was as follows:

"It became increasingly apparent to the writer as she talked to the family members that the murder of Mr. and Mrs. Bronstein is still such a shocking, painful and devastating memory to them that it permeates every aspect of their daily lives. It is doubtful that they will ever be able to recover fully from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them."

(JA \_\_\_\_)(emphasis added). Cf. State v. Rushing, 464 So.2d 268, 275 (La. 1985), cert. denied, \_\_\_\_ U.S. \_\_\_\_, 90 L.Ed.2d 703 (1986) (error to admit testimony that killing was one of most vicious policeman had ever seen since this was tantamount to

survivors that their lives would never be the same again.

\* \* \*

No one could remain untouched by the genuine suffering conveyed in the statement. But that is, in fact, our point. This type of emotional, inflammatory evidence "has no place in a statutory weighing process which owes its very existence to the constitutional mandate that the death penalty must not be administered in an arbitrary or capricious manner." Booth, 306 Md. at 241, 507 A.2d at 1133 (Cole, J., concurring in part and dissenting in part). Survivors (and understandably sympathetic parole and probation agents) cannot be permitted to function as supplemental prosecutors, raising a hue and cry for vengeance. Because petitioner's sentence of death very

---

opinion that alleged aggravating factor existed).

likely was -- and surely appeared to be--  
based on caprice and emotion, not reason,  
this Court must overturn it.

CONCLUSION

The Court should reverse the judgment  
of the Court of Appeals of Maryland.

Respectfully submitted,

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Dated: December 3, 1986

# **RESPONDENT'S BRIEF**



3  
No. 86-5020

FILED  
JAN 26 1986  
JESSE B. BRANNAN, JR.  
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

JOHN BOOTH,

*Petitioner,*

v.

STATE OF MARYLAND,

*Respondent.*

ON WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF MARYLAND

## BRIEF FOR RESPONDENT

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### **QUESTION PRESENTED**

Whether a victim impact statement (i) is relevant as a circumstance of the crime, (ii) contributes to the retributive goal of punishment, and (iii) reflects appropriate State legislative judgment, and thus is admissible at a capital sentencing under the Eighth Amendment?

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No. 86-5020

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN BOOTH,  
  
Petitioner  
  
v.

STATE OF MARYLAND,  
  
Respondent

ON WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The Petitioner, John "Ace" Booth (Booth) was found guilty by a jury of the first degree murder of Irvin Bronstein. The jury found that Booth was a principal in the first degree to that murder which was



both premeditated and felony-murder under Maryland law and imposed the death sentence. The jurors also found Booth guilty of murder in the first degree of Mrs. Bronstein for which the court imposed a life sentence. Booth also received consecutive 20 year sentences for the robbery of Mr. Bronstein, for the robbery of Mrs. Bronstein, and for conspiring with his friend, Willie Reid, and with his nephew, Darrell Brooks, to rob the Bronsteins. The evidence adduced at the guilt phase showed the following facts:

Irvin Bronstein, age 78, and his wife, Rose, age 75, lived at 3412 Rockwood Avenue in West Baltimore. Booth, age 29 at the time of the murders, lived with his mother at 3416 Rockwood Avenue, two doors away from the Bronsteins. Booth's friend Reid lived with his girlfriend, Veronda Mazyck, and her two sons in an apartment in East Baltimore. On May 18, 1983, Booth and Reid left Mazyck's apartment around 4:00 p.m. and returned around 9:00 p.m. The men had heroin which Booth, Reid, and Mazyck injected. Reid also had a

small brown paper bag filled with jewelry. He explained that he and Booth had made a "hustle" which Mazyck interpreted as meaning that "they went out and stole it."<sup>1</sup> (T. 9/26: 99-110).

A neighbor dropped by while the jewelry was spread on the table. Booth and Reid asked her if she wanted to buy any of it. While the neighbor was in the apartment, two other couples stopped by. One of the men paid Reid \$2.00 so that he and his companion could use the apartment to inject themselves with heroin. Booth and Reid asked "the junkies" for the use of a car so that Booth and Reid could pick up some television sets. (T. 10/2: 17-30).

Sometime that evening Booth telephoned his girlfriend, Jewel Edwards, and asked her to meet him

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<sup>1</sup> Willie Reid was tried separately and convicted as a principal in the first degree of the murder of Mrs. Bronstein for which Reid was sentenced to death. The Maryland Court of Appeals affirmed the judgments of conviction, but ordered further proceedings with respect to the death sentence, without affirmance or reversal of that sentence. See Reid v. State, 305 Md. 9, 501 A.2d 436 (Md. 1985).

at Mazyck's apartment so she, a licensed driver, could drive them somewhere. Ms. Edwards arrived at the apartment and she, Booth, Reid, and Ms. Mazyck left, telling the neighbor that they were going "to pick up the T.V.'s." (T. 10/1: 76-85; 10/2: 26).

The two couples took a cab to Booth's mother's home. Booth went into the house while the other three remained outside. Booth returned with green plastic trash bags, then went back into his mother's house and came out with gloves for everyone to wear. The group proceeded to the rear of the neighboring Bronstein home. Before entering, Booth pointed out the Bronsteins' car to Ms. Edwards as the car which she would be driving and handed her the keys to the car. Also before the group entered the Bronstein home, Booth told the women that they should pay "no mind" if they saw any dead bodies. (T. 9/26: 117-122; 10/1: 89-95).

The two couples entered the house through the rear door and the two women saw the bound and

gagged corpses of Mr. and Mrs. Bronstein in the living room. The group looted the house and placed the stolen property, including two television sets, into the Bronsteins' car. When one of them realized that they had left a trash bag in the house, Booth said not to worry because the police would think that the bag had been left by people who were working on the Bronsteins' lawn that day. (T. 9/26: 126-136; 10/1: 97-105).

The two couples returned with the loot to Mazyck's apartment. Booth and Reid obtained heroin and the couples "fired up." Later, while lying in bed, Ms. Edwards asked Booth if the people whom she had seen in the house were actually dead. Booth replied that they were and that he had killed the man while Reid had killed the woman. (T. 10/1: 110-127).

The next morning Ms. Mazyck asked Booth why the elderly couple had been killed, and Booth told her that it was because the elderly couple knew Booth and his nephew, Darrell Brooks. (T. 9/26: 144).

In the afternoon of May 20, 1983, the Bronsteins' son, Barry, went to his parents' home to pick up his father in order that both men could get tuxedos for the Bronsteins' granddaughter's upcoming wedding. When he arrived at his parents' residence, Barry noticed that his father's car was not there. Barry went up to his parents' front porch where he found three or four newspapers strewn about and the front door unlocked. He entered the house and saw his mother lying on the living room floor in a pool of blood and his father in the same condition on the sofa. A dark green plastic bag covered Mr. Bronstein's face and his hands were tied together. Mrs. Bronstein was bound and gagged with a green sweater or rag tied around her head. Each had been stabbed in the chest 12 times. Blood covered the rug, couch and chairs. The Bronsteins' son saw a knife on a dining room chair. The house was in disarray and had been ransacked. Property including money, television sets, jewelry, and the couple's 1972 Chevrolet Impala

automobile was missing. The police found the car abandoned and partially stripped on the parking lot of a public housing project in East Baltimore. The police were able to associate Booth with the abandoned car and arrested him on June 7, 1983 (T. 9/25: 57-73; 9/26: 64-85).

After the jury found him guilty as a principal in the first degree of the murder of Irvin Bronstein, Booth chose to have the same jury determine his sentence. At that proceeding, the prosecutor incorporated by reference all evidence from the guilt phase of the bifurcated proceeding. The pre-sentence investigation report and the victim impact statement



were also admitted.<sup>2</sup> The prosecutor read the victim impact statement to the jury. (T. 10/15: 50-64).

Derived from interviews with the victims' son, daughter, son-in-law, and granddaughter, the statement narrates the specific reactions of the family to the murders. The son, who was the first person to find his parents' bodies, described the effect upon him: difficulty sleeping, inability to drive on the streets that pass near his parents' home, avoidance of his father's favorite restaurant and the supermarket where his parents shopped, and fear for the first time in his life. He did not know if he would ever be the same again.

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<sup>2</sup> Prior to the commencement of the sentencing proceeding, Booth's counsel objected to admission of a victim impact statement contending that it was arbitrary and inflammatory. He also argued that Article 41, §124(d), which required the admission of a victim impact statement in a capital sentencing proceeding, constituted an ex post facto law. The trial court overruled these objections. Booth and his attorney then chose to have the victim impact evidence presented in written form, rather than through the live testimony of the Bronstein family members (J.A. 1-11).

The victims' daughter recalled that she felt numb and cold when she arrived at her parents' house. She and her husband did not eat dinner for three days following the discovery of her parents' bodies. Crying became a daily part of their lives. Her reactions included an inability to sleep through the night, the failure to find much joy in anything, and a loss in her power of concentration. She also described how she had to clean out her parents' house, a task which took several weeks. The sight of the bloody carpet made her want to get on the rug and hold her mother. Kitchen knives reminded her of the murders. She was no longer able to watch movies depicting bodies or stabbings or to tolerate any reminder of violence.

The victims' daughter attended the defendant's trial and that of his co-defendant to represent her parents. She had never been told the exact details of her parents' death. After listening to a portion of the medical examiner's testimony, her mind blocked and she stopped listening. She agreed with her brother

that the lives of their family members would never be the same again.

Because the Jewish religion dictates that birth and marriage are more important than death, the granddaughter's wedding had to proceed on May 22, two days after her grandparents' bodies were found. Although the granddaughter had been eagerly looking forward to her wedding, it was a sad occasion with people crying. The reception, which normally would have lasted for hours, was very brief. The following day, instead of going on her honeymoon, she attended her grandparents' funeral. Her grandparents' deaths were, for her, "a completely devastating and life altering experience." She, too, was unable to drive near her grandparents' home and developed a tendency to turn on all the lights in her home and to become very worried if her husband was late coming home from work. (The Victim Impact Statement is reprinted in its entirety in the Joint Appendix at 57-64.)

Booth presented four witnesses who testified in mitigation of punishment, Booth's mother and grandmother, the Chairman of the Maryland Parole Commission, and a Catholic priest. Booth's mother, June Sparrow, described the unstable family environment in which Booth was raised. Mrs. Sparrow recalled that she and Booth's father fought most of the time, that her husband frequently stayed away from home for long periods of time, and that she tended to stay away for two to four days at a time. This pattern of behavior continued for many years during which Booth was responsible for looking after his four brothers and sisters. In 1964 the Department of Social Services placed the children in foster homes. Mrs. Sparrow did not see her children for a period of six months. Booth was removed to a different foster home after suffering abuse at the first foster home in which he was placed. (J.A. 13-25).

Booth's mother described him as very timid when growing up. She admitted dressing him in his

sister's dress and bonnet and sending him out to play. She did this because he was so timid. She let other people beat on him and "told him only little sissies act like that." That was her way of punishing Booth for his timidity (J.A. 25-29).

Sarah Bailey, Booth's grandmother, testified about losing an arm as the result of a gunshot wound. This caused her to become very depressed and she refused to leave her house. She remained like that until Booth was born three years later. Mrs. Bailey testified that she felt as if Booth's birth had healed her. She began using her artificial arm so that she could hold him and carry him around. She gradually came out of her shell, sought employment and found a job. She told the jury that she owed her renewed outlook on life all to Booth: "I still love John. I'm sorry but I love him. I can't help from loving him because if it wasn't for his birth, I would be sitting home." (J.A. 31-38).

William Kunkel, Chairman of the Maryland Parole Commission, testified that, under then current law and rules, if Booth received two life sentences and three 20 year sentences, all consecutive, he would be eligible for consideration for parole in 45 years with diminution for time credits earned. He also indicated that Booth could not be paroled without the Governor's permission (T. 10/15: 118-125).

Father Thomas Schindler, a Catholic priest, testified as an expert in social ethics. He told the jury that, based upon his interview with Booth four days earlier, and based upon his knowledge of the facts of the case and Booth's background, he was of the opinion that Booth's moral capacity was that of a child (J.A. 39-56).

On direct review, the Court of Appeals of Maryland rejected the 19 challenges raised by the Petitioner and affirmed the judgments of conviction and the death sentence imposed upon Booth (J.A. 90-148).



### **SUMMARY OF ARGUMENT**

Maryland's capital sentencing statutory scheme provides the requisite procedural safeguards to prevent the infliction of capital punishment in an arbitrary and capricious manner. Under the Maryland procedure, victim impact evidence must be admitted at the sentencing phase along with other constitutional and statutorily mandated considerations.

Victim impact is a circumstance of the crime. It is probative of the harm caused by the defendant's actions. Victim impact evidence is an appropriate consideration in making a moral judgment of the defendant. The victim impact statement provides a necessary link between contemporary values and the penal system. It serves the legitimate retributive purpose of capital punishment.

For all of these reasons, the Maryland General Assembly's determination that a victim impact statement is appropriate information for consideration by

the capital sentencer does not offend the Eighth Amendment to the United States Constitution.

### **ARGUMENT**

**A VICTIM IMPACT STATEMENT IS RELEVANT AS A CIRCUMSTANCE OF THE CRIME, CONTRIBUTES TO THE RETRIBUTIVE GOAL OF PUNISHMENT, AND REFLECTS APPROPRIATE LEGISLATIVE JUDGMENT AND THUS IS ADMISSIBLE AT A CAPITAL SENTENCING UNDER THE EIGHTH AMENDMENT.**

Booth claims that the people most directly affected by the murder he committed may not have the facts of the harm they suffer brought before the sentencing jury. Admission of victim impact evidence, he asserts, violates the Eighth Amendment's ban on cruel and unusual punishment by injecting an arbitrary factor into the proceedings. Booth's argument ignores several salient points: Victim impact is a circumstance of the crime. It provides evidence of some of the harm caused by the defendant's actions. Because victim impact evidence bears directly on the fundamental justice of imposing capital punishment and contributes to society's demand that a given affront to

humanity requires retribution, the Maryland Legislature's determination that victim impact is a relevant consideration by a capital sentencer does not offend the Eighth Amendment to the United States Constitution.<sup>3</sup>

Contrary to Booth's argument, Maryland's use of victim impact evidence fits fairly and equitably within the constitutional framework for capital cases. First, the danger of arbitrary and capricious imposition of the death penalty is met "by a carefully drafted statute that insures that the sentencing authority is given adequate information and guidance." Gregg v. Georgia, 428 U.S. 153, 195 (1976) (principal opinion).

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<sup>3</sup> Although Booth refers to both the Eighth and Fourteenth Amendments in his Question Presented and in his Argument heading, he does not make a separate Fourteenth Amendment due process argument. It thus appears that his reference to the Fourteenth Amendment is solely for the purpose of applying the Eighth Amendment to the State of Maryland. To the extent, however, that his brief is interpreted as raising a Fourteenth Amendment due process argument, his concerns are satisfied by the procedural safeguards attendant at his sentencing as set forth in part III, infra.

Second, Maryland's constitutional capital sentencing structure permits consideration of the individual characteristics of the offender and the circumstances of the crime. Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion).

I. A victim impact statement is a relevant circumstance of the crime for assessing the proper penalty.

In a bifurcated capital murder trial such as Booth's, there are fundamental differences between the nature of the guilt/innocence phase and the penalty phase. The trial phase is focused entirely on the determination of historical fact: did Booth commit the crime charged. The penalty phase requires the sentencer to make a moral judgment based on a host of factors. The sentencer "does not attempt to decide whether particular elements have been proved, but instead makes a unique, individualized judgment regarding the punishment that a particular person deserves." Zant v. Stephens, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring). The difference was

further explained in California v. Ramos, 463 U.S. 992, 1008 (1983):

"In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In facing a penalty, however, there is no similar 'central issue' from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized." (Footnote omitted).

Accord, Barclay v. Florida, 463 U.S. 939, 950 (1983) (plurality opinion). As a constitutionally indispensable part of the death penalty process, the factors considered by the capital sentencer must include "the character and record of the individual offender and the circumstances of the particular offense." Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion, emphasis added).

In order to provide for individualization in the choice of a life or death sentence, the Maryland General Assembly has determined that the following types of evidence are admissible in a capital sentencing proceeding:

(i) Evidence relating to any mitigating circumstance listed in subsection (g) [Article 27, §413];

(ii) Evidence relating to any aggravating circumstance listed in subsection (d) of which the State had notified the defendant pursuant to §412(b);

(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures;

(iv) Any pre-sentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and

(v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements."

Md. Ann. Code, art. 27, §413(c) (1982 Repl. Vol. & 1986 Cum. Supp.).



In 1982, in response to the outcry from crime victims and their families who felt left out of the sentencing process, the Maryland General Assembly enacted legislation requiring that the pre-sentence investigation report include a victim impact statement if:

"(1) The defendant, in committing a felony, caused physical, psychological, or economic injury; or

(2) The defendant, in committing a misdemeanor, caused serious physical injury or death to the victim."<sup>4</sup>

The following year the Maryland Legislature expressly tied together victim impact evidence and capital sentencing proceedings. Since July 1, 1983, Maryland has required that:

"[i]n any case in which the death penalty is requested under Article 27, §412, a pre-sentence investigation, including a victim

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<sup>4</sup> The victim impact provisions were originally codified in art. 41, §124 (Petitioner's Brief at 11a-12a) and are now codified in Md. Ann. Code, art. 41, §4-609 (1986 Repl.Vol.). At least 31 other jurisdictions authorize the use of a victim impact statement or similar form of victim input in the sentencing process. See the appendix, infra, for a listing of the pertinent statutes.

impact statement, shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted under Article 27, §413."

In Lodowski v. State, 302 Md. 691, 490 A.2d 1228 (1985), the Maryland Court of Appeals first rejected a constitutional challenge to the admissibility of victim impact evidence at a capital sentencing. The court held that "there is a reasonable nexus between the impact of the offense upon the victim or the victim's family and the facts and circumstances surrounding the crime especially as to the gravity or aggravating quality of the offense." 302 Md. at 741-742. That determination was affirmed in Booth's case where the court specifically noted that the victims in capital cases "include survivors of the murdered individual." Booth v. State, 306 Md. 172, 223, 507 A.2d 1098 (1986) (J.A. at 130).

Although this Court has not yet addressed the scope of the phrase "circumstances of the crime" with respect to the required considerations at a capital

sentencing, many statements by members of the Court indicate that the impact upon the survivors of a murder victim is relevant to the death sentencing process. Fifteen years ago Justice Blackmun, in his dissenting opinion to the judgment rendered in the seminal case of Furman v. Georgia, 408 U.S. 238 (1972), wrote:

"It is not without interest, also, to note that, although the several concurring opinions acknowledge the heinous and atrocious character of the offenses committed by the petitioners, none of those opinions makes reference to the misery the petitioners' crimes occasioned to the victims, to the families of the victims, and to the communities where the offenses took place. The arguments for the respective petitioners, particularly the oral arguments, were similarly and curiously void of reference to the victims. There is risk, of course, in a comment such as this, for it opens one to the charge of emphasizing the retributive. But see Williams v. New York, 337 U.S. 241, 248, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337 (1949). Nevertheless, these cases are here because offenses to innocent victims were perpetrated. This fact, and the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked."

408 U.S. at 413-414 (dissenting opinion). In Coker v. Georgia, 433 U.S. 584, 602 n.1 (1977) (concurring and dissenting opinion), Justice Powell noted that a workable test to distinguish aggravated rape from the more usual case would embrace the following factors: "the cruelty or viciousness of the offender, the circumstances and manner in which the offense was committed, and the consequences suffered by the victim." And, in Enmund v. Florida, 458 U.S. 782, 823 (1982) (dissenting opinion), Justice O'Connor, joined by former Chief Justice Burger, Justice Powell and Justice Rehnquist, wrote:

"As I noted earlier, the Eighth Amendment concept of proportionality involves more than merely a measurement of contemporary standards of decency. It requires in addition that the penalty imposed in a capital case be proportional to the harm caused and the defendant's blameworthiness."

A victim impact statement is relevant to a capital sentencing because it provides evidence of the harm caused by the defendant's actions. Obviously, the murder of a person causes grief to others who were

close to the victim, most notably the victim's family. To identify the survivors and personalize their loss is merely to specify the harm caused by the murder, not to add to it. Victim impact is simply another circumstance of the crime.

Arguing against the relevancy of victim impact evidence, the amicus in support of Petitioner points to the unforeseeable nature of the consequences of the crime upon the survivors and suggests that a defendant will be executed "on the basis of results over which he had no control and which he did not contemplate . . ." (Amicus at 16). It is difficult to believe that John Booth, a neighbor of the Bronsteins, who knew their comings and goings including when their lawn was mowed, would not know that the Bronsteins had children and grandchildren who were leading active lives on the fatal day of May 18, 1983. However, even if he did not actually know that the Bronsteins had living family members, it does not take a great leap of imagination to consider the probability of their

existence. As one jurisdiction has noted, "[C]ommon sense tells us that murder victims do not live in a vacuum and that, in most cases, they leave behind family members." People v. Free, 447 N.E.2d 218, 236 (Ill. 1983). It is reasonable and foreseeable to think that the murder of another human being will directly and unalterably affect the lives of the survivors of the murder victim.

Full assessment of the gravity of a defendant's actions requires consideration of the impact of the offense upon the victim and his survivors. In Maryland, a victim impact statement, relating a circumstance of the crime, provides this highly relevant information at a capital sentencing.

II. A victim impact statement contributes to the retributive goal of capital punishment.

Retribution and deterrence have been recognized as the two principal social purposes served by



the death penalty.<sup>5</sup> E.g., Gregg v. Georgia, 428 U.S. at 183-187 (1976) (principal opinion); Enmund v. Florida, 458 U.S. at 798-801. In Furman, the social purpose served by retribution was described by Justice Stewart:

"The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy — of self-help, vigilante justice, and lynch law."

408 U.S. at 308 (concurring opinion). A proper application of the Eighth Amendment requires an assessment of contemporary values concerning the infliction of capital punishment. Certainly, the

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<sup>5</sup> Rehabilitation and incapacitation, the two other components of sentencing, are not constitutionally furthered by imposition of the death penalty, Spaziano v. Florida, 468 U.S. 447, 477-78 (1984) (Stevens, J., concurring and dissenting) and thus cannot serve to validate use of victim impact evidence.

question whether the death sentence is an appropriate response to the particular facts and circumstances of a case depends in large measure on the retributive element of punishment. As explained in Gregg:

"In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."

428 U.S. at 183 (principal opinion). Accord, Spaziano v. Florida, 468 U.S. at 480-481 (Stevens, J., concurring and dissenting). The victim impact statement in a capital sentencing thus provides a necessary link between contemporary values and the penal system. Consequently, the Eighth Amendment is not offended even though victim impact evidence may anger the sentencer.

As described above in part I., the gravity of Booth's actions is better put into proper context by reference to the impact upon the victims and their survivors. Furthermore, those victims and their

survivors are members of the community whose assessment of Booth's conduct plays a vital role in the life or death choice at a capital sentencing. The sentencer as representative of the community is entitled to know the nature and extent of the harm caused to some of its members by another of its members. See Brooks v. Kemp, 762 F.2d 1383, 1410 (11th Cir. 1985), where the court held that a reference to the loss suffered by the victim's family "is no more than a compelling statement of the victim's death and its significance, relevant to the retributive function of the death penalty." Accord, Johnson v. Wainwright, 778 F.2d 623, 630 (11th Cir. 1985), cert. denied, 106 S.Ct. 1337 (1986). See also State v. Oliver, 307 S.E.2d 304, 326 (N.C. 1983) (prosecutor's emphasis of victims' rights was proper in death sentencing where emphasis is on the circumstances of the crime and the character of the criminal); "State Legislation in Aid of Victims and Witnesses of Crime," 10 Journal of Legislation 394,

402-403 (1983); "The Forgotten Party — The Victim of Crime," 18 U.B.C. Law Review 319, 324-325 (1984).

In assessing the retributive justification for executing the defendant in Enmund, the Court focused upon the defendant's "moral guilt" — what the defendant's intentions, expectations, and actions were. 458 U.S. at 800. Another necessary component of society's moral judgment regarding a defendant is the amount and degree of harm caused by the defendant's actions — the impact upon the victim and the victim's family.

In the instant case, when Booth and his cohorts were about to enter the Bronsteins' home to gather more loot, Booth told them to pay "no mind" to the dead bodies. The Bronsteins' son, however, who found his parents' slain bodies could not pay "no mind." The impact of his parents' murders upon his family was a relevant component in the sentencer's assessment of Booth's "moral guilt." Justifiable moral outrage at the defendant's conduct which has caused harm to other

members of the community is an appropriate response by the capital sentencer.<sup>6</sup> As such, the admission of a victim impact statement measurably contributes to an acceptable goal of capital punishment.

III. The Maryland General Assembly's direction that the capital sentencer consider victim impact evidence is an appropriate legislative judgment.

To guard against the arbitrary and capricious imposition of the death penalty, this Court has principally been concerned with the procedure by which a State imposes the death sentence. California v. Ramos, 463 U.S. at 999-1000. Where discretion is afforded, "that discretion must be suitably directed and limited so as to minimize the risk of wholly

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<sup>6</sup> The prosecutor in Booth made this very argument to the sentencer when he referred to the victim impact statement in his closing argument at the penalty phase: "Read the victim-impact statement and realize that when he [Booth] walked out of that house with his loot, he knew or he should have known that this is the kind of horror he would be inflicting upon a whole family, upon a whole community, and then say to yourselves this, is his moral capacity more important than this? In this instance, you are the conscience of the community." (T. 10/16: 56-57).

arbitrary and capricious action." Gregg v. Georgia, 428 U.S. at 189.

Maryland's capital sentencing scheme contains strong procedural safeguards. There is a bifurcated trial with separate proceedings for guilt and sentencing. In determining the penalty, the sentencer must first determine whether any of the statutorily enumerated aggravating circumstances have been proven beyond a reasonable doubt. It then must determine whether any mitigating circumstances exist by a preponderance of the evidence — the mitigators include seven statutorily defined factors and any other facts which the sentencer deems mitigating. The sentencer must then weigh the aggravating circumstances and the mitigating circumstances. Only if it finds that the aggravating outweigh the mitigating by a preponderance of the evidence, is the death sentence imposed.

The Court of Appeals of Maryland must review all death sentences under Maryland's capital



sentencing statute. That court must determine whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; whether the evidence supports the jury's or the court's finding of a statutory aggravating circumstance; whether the evidence supports the sentencer's finding that the aggravating circumstances outweigh the mitigating circumstances; and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Md. Code Ann. art. 27, §§ 413-414 (1982 Repl. Vol. & 1986 Cum. Supp.). See, e.g., Foster v. State, 304 Md. 439, 471-480, 499 A.2d 1236 (1985), cert. denied, 106 S.Ct. 3310 (1986).

In the instant case, the jury which Booth elected as his sentencer found that statutorily enumerated aggravating circumstance number 10 was proven beyond a reasonable doubt: the defendant committed the murder while committing robbery. (J.A. 66). Although the jury did not find any of the seven

statutorily enumerated mitigating factors, it did find other mitigating circumstances. The jury specifically wrote in Section II, number 8 of the verdict sheet the following mitigating circumstances:

"A. Family environment.

1. Child Neglect.

2. Lack of Strong Father Image."

(J.A. 67).

The impact of the crime upon the victim is not listed on the verdict sheet as a separate aggravating factor, nor should it be. Victim impact is a circumstance of the crime. It has no relevance apart from the crime. It is simply part and parcel of "the gravity or aggravating quality of the offense." Lodowski v. State, 302 Md. at 742.<sup>7</sup> Victim impact evidence

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<sup>7</sup> Booth did not ask for an instruction on the use of the victim impact statement. Had he made such a request, an appropriate instruction would have been that the sentencer may consider the impact of the offense upon the victim or the victim's family as it relates to the gravity or aggravating quality of the offense. See Lodowski, 302 Md. at 741-742.

completes the information which is appropriate for the sentencer to consider in making the "highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves." Caldwell v. Mississippi, 472 U.S. \_\_\_, \_\_\_, n.7, 105 S.Ct. 2663 (1985), quoted in Turner v. Murray, 476 U.S. \_\_\_, 106 S.Ct. 1683, 1687 (1986).

While the victim impact statement was not highlighted in the court's instructions or on the verdict sheet, the jury was appropriately and correctly instructed regarding the nature of the mitigating circumstances. Each statutorily enumerated factor was described, and as to number 8, the jury was instructed:

"Now with respect to number eight, any fact or facts that the defendant claims or proposes as a mitigating circumstance or any fact or facts that any member of the jury proposes that could be a potential mitigating circumstance, must be considered by each member of the jury. So in number eight, you, the jury, may consider. If all twelve members of the jury unanimously find that any or all of the proposed facts or mitigating circumstances, either proposed by the defendant

or by the members of the jury, have been proven by a preponderance of the evidence, you list them under number eight and consider them along with the first seven mitigating circumstances, which have been set out on your sheets. You must consider all of the proposed mitigating circumstances that have been proposed by the defendant or the members of the jury, but list in number eight only those that have been unanimously found by the jury to be a mitigating circumstance and that have been proven by a preponderance of the evidence."

(T. 10/16: 28-29). Regarding the weight to be given a mitigating circumstance, the court specifically instructed the jury that a single mitigator can justify the imposition of a life sentence:

"With respect to section three, in balancing the various factors, you are not involved in a mere counting process. It is a weighing process and you may find that a single mitigating circumstance is sufficient in weight to justify a life sentence even if you find more than one aggravating circumstance."

(T. 10/16: 31, emphasis added). Thus, it is abundantly clear that Booth's sentencer was allowed to give independent weight to mitigating aspects of the defendant's character and record and to circumstances

of the offense. Lockett v. Ohio, 438 U.S. at 605; Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). And, as noted above, Booth's sentencer found that certain aspects of Booth's background were mitigating.

Booth points to other concerns regarding the use of the victim impact statement. He argues that victim impact evidence in a capital sentencing invites the imposition of a death sentence on the basis of peculiar and invidious grounds such as race, religion or wealth. (Petitioner at 10). This argument clearly lacks merit. It was not the victim impact statement that pointed out the economic differences between Booth and the Bronsteins. Booth's victims were selected by him presumably because they had valuable items he thought worth stealing to support his drug habit. The race of the victims was revealed by autopsy pictures and by the appearance of their son, Barry Bronstein, at the guilt stage. Race was not mentioned in the Victim Impact Statement. In our pluralistic society, religious beliefs fortunately can take many paths. Consequently

religious background information hardly infuses an arbitrary factor by itself.

In any event, where necessary, these concerns can and should be addressed during the voir dire of the jury. In Turner v. Murray, 476 U.S. at \_\_\_, 106 S.Ct. at 1688, this Court "recently held that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." Similarly, the jury venire can be informed of the social status and the religious affiliation of the victim and the prospective jurors can be questioned on the issues of religious and social status bias.

The impact of the crime upon the victim's survivors will necessarily differ in each case. The individual differences in each victim impact statement do not, however, cause the sentencing to run afoul of the constitutional requirement that capital punishment be imposed fairly and with reasonable consistency, or not at all. E.g., Eddings v. Oklahoma, 455 U.S. at



112. Just as the sentencer is required to consider the individual characteristics of the defendant's background in determining whether mitigating circumstances exist, so too is it appropriate for the sentencer to be informed of the impact of the crime upon the victim's survivors in determining the gravity or aggravating quality of the offense. In Eddings, this Court recognized that the need for a sentencer to consider possible mitigating circumstances in the individual characteristics and background of the particular defendant did not render that capital sentencing unreasonably inconsistent with other death penalty sentencings. What the Court said there applies equally to the individual differences that exist in the impact of the crime upon its victims: "[T]he rule in Lockett recognizes that a consistency produced by ignoring individual differences is a false consistency." Eddings, 455 U.S. at 112.

Booth emphasizes the emotional nature of victim impact evidence, and argues that it serves solely

to inflame the sentencer (Pet. at 9). No one can dispute the potential emotional quality of victim impact evidence. Yet, it is appropriate to consider this evidence where death is involved. Just as the defendant is entitled to bring in evidence regarding the impact his death would have upon his survivors and why his life should be spared, so too the sentencer is entitled to know the impact the murder has already had upon the victim's family.<sup>8</sup> So long as retribution is a legitimate goal of sentencing, victim impact evidence is an appropriate part of the equation to be balanced in determining whether death is the appropriate sentence.

Since Furman, this Court has repeatedly acknowledged the principle that "the requirements of the Eighth Amendment must be applied with an

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<sup>8</sup> The amicus' concern that the admission of victim impact evidence would necessitate expansion of the proof offered on behalf of defendants (Amicus at 31) is hollow. The defendant is already entitled to bring in any evidence whatsoever as mitigating circumstances. Md. Code Ann. art. 27, §413(g)(8); Lockett, supra.

awareness of the limited role to be played by the courts." Gregg v. Georgia, 428 U.S. at 174. Under our federal system, great deference is owed to the decisions of the State legislature. This is particularly true "where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'" Gregg v. Georgia, 428 U.S. at 176, quoting Gore v. United States, 357 U.S. 386, 393 (1958).<sup>9</sup>

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<sup>9</sup> Since Gregg, this Court has had many opportunities to repeat this principle: Woodson v. North Carolina, 428 U.S. at 294-295 ("[L]egislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency."); California v. Ramos, 463 U.S. at 1001 (Beyond certain noted limitations, "the Court has deferred to the State's choice of substantive factors relevant to the penalty determination."); Skipper v. South Carolina, 476 U.S. 106 S.Ct. 1669, 1674 (Powell, J., concurring) ("[T]he States, and not this Court, retain 'the traditional authority' to determine what particular evidence within the broad categories described in Lockett and Eddings is relevant in the first instance. (citation omitted). As long as those determinations are reasonable — as long as they do not foreclose consideration of factors that may tend to reduce the defendant's culpability for his crime, (citation omitted), — this Court should respect them.").

This Court has also recognized that society has important and legitimate interests in retribution and deterrence, and that these interests provide the necessary justification for imposing the death penalty. Gregg v. Georgia, 428 U.S. at 183-187 and other cases cited above in part II. The State of Maryland, through its elected representatives, has determined that a victim impact statement is relevant as a circumstance of the crime and serves the retributive goal of capital punishment. It has therefore mandated that it be considered by the capital sentencer along with all other relevant evidence relating to the aggravating and mitigating circumstances of the case. In doing so, the State has complied with the requirements of the Eighth Amendment.

As mandated by the Maryland Legislature, the Court of Appeals of Maryland reviewed Booth's sentencing proceeding, including the particular victim impact statement admitted in the case. It correctly determined:

"Given the nature of the subject matter, it is a relatively straightforward and factual description of the effects of these murders on members of the Bronstein family. We are satisfied that the sentence of death was not imposed in this case under the influence of passion, prejudice or any other arbitrary factor. §441(e)(1). There was no error here in the admission of the victim impact statement."

(J.A. 131).

### CONCLUSION

For the foregoing reasons, the State of Maryland requests that the judgment of the Court of Appeals of Maryland be affirmed.

Respectfully submitted,

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### APPENDIX

-1a-

Jurisdictions with statutory authorization for victim impact evidence:

Alaska Stat. §12.55.022 (1984);  
Ariz.Rev.Stat. Ann. §12-253(4) (Supp. 1986);  
Ark.Stat. Ann. §75-2502(c) & 2506 (Supp. 1985);  
Cal.Penal code §1203(h) (Supp. 1987); Col.Rev.Stat. §16-11-102 (1986); Conn.Gen.Stat. Ann. §54-91c (1985);  
Del.Code Ann. tit. 11, §4331 (Supp. 1986);  
Fla.Stat. Ann. §921.143 (1985); Ind.Code Ann. §35-38-1-8 & 9 (Burns 1985 & Supp. 1986); Iowa Code Ann. §901.3 (Supp. 1986); Kan.Stat. Ann. §21-4604(2) (Supp. 1985); La.Rev.Stat. 46:1844(9) (Supp. 1986);  
Me.Rev.Stat. Ann. tit. 17-A, §1257 (Supp. 1986);  
Md.Code Ann. Art. 41, §4-609 (1986 Repl.Vol.);  
Mass. Ann.Laws ch. 279, §4B (Supp. 1986);  
Minn.Stat. Ann. §609.115 1b (Supp. 1987); Mont.Code Ann. §46-18-112 (1985); Neb.Rev.Stat. §29-2261 (Supp. 1984); Nev.Rev.Stat. §176.145(3) (1986); N.J.Stat. Ann. §2C:44-6.b (Supp. 1986); N.Y. Crim.Proc.Law



§390.30(3b) (Supp. 1987); Ohio Rev.Code Ann. §2947.051 (Supp. 1985); Okla.Stat.Ann. tit. 22, §982 (1986); Or.Rev.Stat. §144.790(2), (4) (1985); R.I.Gen.Laws §12-28-4 (Supp. 1986); S.C.Code Ann. §16-3-1550 (1985); Tenn.Code Ann. §40-35-207(8) (Supp. 1986); Vt.Stat.Ann. tit. 13, §7006 (Supp. 1986); Va.Code, §19.2-299.1 (Supp. 1986); W.Va.Code §§61-11A-1 to -7 (1984); Wis.Stat.Ann. §950.04(2m) (Supp. 1986); Fed.R.Crim.P. 32(c)(2)(C).

**AMICUS CURIAE**

**BRIEF**

In The  
**Supreme Court of the United States**

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October Term, 1986

JOHN BOOTH,

*Petitioner,*

VS.

STATE OF MARYLAND,

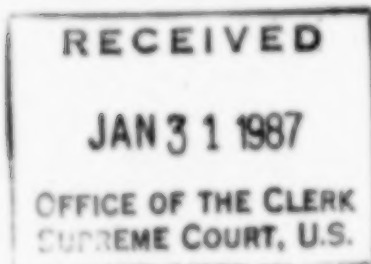
*Respondent.*

*On Writ of Certiorari to the Court of Appeals of Maryland*

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**BRIEF OF AMICUS CURIAE STEPHANIE ROPER  
FOUNDATION, INC., IN SUPPORT OF RESPONDENT**

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**QUESTION PRESENTED**

**Whether victim impact evidence  
is appropriate for consideration at sentencing.**



STATEMENT OF INTEREST OF  
AMICUS CURIAE

The Stephanie Roper Foundation, Inc., (the Foundation) is a private, non-profit volunteer-based organization incorporated under the laws of the State of Maryland. The Foundation and its sister organization, The Stephanie Roper Committee, Inc.) provides assistance free of charge to crime victims. Services available include:

- . legal services
- . transportation to court
- . counseling and assistance

- regarding the trial process.
- . court-watch programs
- . a public speaking network
- . legislative and  
intergovernmental services

The Foundation requires no dues for membership, and subsists upon donations from members, charitable organizations, and the general public.

The membership of the Committee is composed of concerned citizens from all 50 states, several U.S. territories and foreign countries, although the vast majority of members reside in Maryland.

Currently, membership exceeds 11,000 in number.

In the spring of 1982, Stephanie Roper, a 22 year old honor student, and the Foundation's namesake, was brutally raped and murdered. When her two murderers were sentenced in the fall of that year, no victim impact statements were prepared or considered, in apparent contravention to Chapter 495 of the Laws of Maryland, 1982. To rectify this situation, the Foundation drafted remedial legislation which was introduced, amended, and passed as Chapter 345 of the Laws of Maryland, 1983. Of Counsel on this



brief is Kurt W. Wolfgang, who was in 1983 the registered lobbyist for the Foundation, and who, along with members of the legislature, participated in drafting the 1983 legislation.

The outcome of the present case, is the first victims rights legislation ever scrutinized by our nation's Supreme Court, will affect victims rights legislation across the country, and will provide the most powerful measure to date with which crime victims and their survivors can assess the gravity assigned by the courts to their anguish and suffering. Both petitioner and respondent

have consented to the filing of this  
amicus curiae brief, and their letters of  
consent are attached hereto as Appendix  
A.

### Summary of the Argument

The State of Maryland has a legitimate interest in providing the sentencing authority in criminal cases with evidence related to the social, personal, and societal consequences, or costs, of the convicted criminal's intentional violence. Because of the relevance of victim impact evidence upon sentencing, admission of such evidence is congruous with the constitutional principals applicable to sentencing, including capital sentencing.



### ARGUMENT

VICTIM IMPACT EVIDENCE IS RELEVANT, APPROPRIATE EVIDENCE FOR CONSIDERATION AT SENTENCING.

Historically, only the state and the defendant have been considered parties to criminal proceedings. The legal fiction that a crime is committed only against the state has led to some absurd, and avoidable inequities in the past.

Recently, legislatures and courts have expanded the role of crime victims in criminal proceedings, in order to correct some of those inequities of the past. One of the areas in which legislatures and courts have sought to increase

the participation of crime victims is during sentencing through the provision of evidence relating to the consequences of the criminal upon the victim and his or her family. Maryland enacted such a law allowing, in cases of violent crime, for the submission of a written victim impact statement.

In 1983, two changes were affected to this law which constitute the subject of the present controversy. Chapter 345 of the Laws of Maryland, 1983, allows that a victim's family can provide the necessary information to be presented during sentencing, if the victim is un-

able. More importantly, the legislature clarified its original law to reflect that victim impact statements should be applied in capital sentencing as well as the sentencing of other violent offenses. The Maryland General Assembly had determined the propriety and relevance of victim impact statements for all sentencing, including death penalty sentencing. Recently, the Maryland General Assembly has again affirmed its policy of requiring convicted violent criminals to account for the consequences of their actions. The legislature passed a law allowing victims to present an oral address at



time of sentencing, much like the defendant's right to allocate at sentencing in Maryland.<sup>1</sup>

The petitioner considers victim impact evidence to be irrelevant. The more progressive view, however, is quite the opposite view. The American Bar Association's Guidelines for the Fair Treatment of Victims and Witnesses<sup>2</sup> (ABA Guidelines) were the culmination of a comprehensive effort to formulate guidelines that respected the rights of both defendants and victims. In August, 1983, the ABA Guidelines were adopted by the Asso-

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1. MD. Ann Code of 1957, art. 26 § 643D

ciation's policy-governing body, the House of Delegates.

The ABA Guideline 11 provides:

GUIDELINE 11

Prior to the sentencing of an offender in a serious case, victims or their representatives should have the opportunity to inform the sentencing body of the crime's physical, psychological, and financial repercussions on the victim's family. Jurisdictions may do this in one or several ways, including:

(a) written statement prepared by the victim's family. Jurisdictions may do this in one or several ways, including:

(b) written statement prepared by the probation department after consultation with the victim or the victim's representative; and/or

(c) oral statement by

2. ABA, Guidelines for the Fair Treatment of Victims and Witnesses in the Criminal Justice System (1983).

the victim or the victim's representative before the sentencing body.

The rationale for this guideline is set out in the commentary accompanying model victim impact legislation promulgated by the ABA and the National Association of Attorney's General: <sup>3</sup>

#### Commentary

The December 1982 Final Report of the President's Task Force on Victims of Crime has recommended that legislation be proposed and enacted to require victim impact statements at sentencing. The American Bar As-

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3. U.S. Department of Justice, Office of



sociation and the National Organization for Victims Assistance are among the national organizations which have endorsed such statements.

Most states' common law allows the sentencing court to solicit information from crime victims and whomever else may have relevant information. However, legislation instituting formal procedures giving victims the opportunity to initiate "victim impact statements" informing and sentencing court of the crime's impact on them and their families is a phenomenon which began only a few years ago. nevertheless, today the federal government and thirty-four states have enacted legislation authorizing written victim impact statements. In addition, nineteen states have explicitly authorized the victim or the victim's representative to appear personally or by counsel at the sentencing hearing.

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Justice Programs Office for Victims of  
Crime, Victims of Crime, Proposed  
Model Legislation (1986), p. 11-4

Just decisions require reliable--and complete--information. The victim impact statement provides a means whereby information about the crime's impact can be provided to the sentencing court from those most directly affected financially, socially, psychologically, and physically.

The ABA Guidelines reach a similar conclusion: <sup>4</sup>

Prior to the sentencing an offender in a serious case, victims or the representatives should have the opportunity to inform the sentencing body of the crime's physical, psychological, and financial repercussion on the victim or on the victim's family...

In addition, the comments to the ABA guideline are relevant to the defendant's assertions.

Victim impact evidence is relevant to a sentencing court.

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4. ABA Guidelines, pp.19-21

"Good [sentencing] decisions require good -- and complete -- information allowing the victim to provide factual information to the sentencing court about issues of relevance to the sentencing is no more a play on the sympathy of the sentencing court than allowing the defendant to provide facts about his or her personal circumstances which may affect a just sentence.

...Allowing victims direct or indirect access to the sentencing body at this final stage is of course the most effective means of guaranteeing that such relevant personal information is brought to its attention.


A convicted criminal is responsible, and should be held responsible, for the consequences of his violence. When a bank robber enters



a bank, he has no idea how much money, if any, he will retrieve. Under the analysis of the petitioner, the amount stolen should not only be irrelevant, but the Supreme Court should dictate its irrelevance to the states, because the convicted criminal could not have foreseen nor controlled the amount of money he could liberate. Perhaps more to the point, the petitioners analysis would hold that since the criminal could neither control nor foresee the abject terror resulting from his brandishing a firearm within the bank, that it

would not only be unjust, but unconstitutional for the states to allow such spurious events to be accounted for at time of sentencing.

What of the terrorist hijacker who holds a hostage for weeks, or even years? The poor, misguided soul had no way of knowing that constitution of his victim's family was such that his crime would cause emotional, or perhaps even physical scars which could last, and ruin, a lifetime. These "fortuitous circumstances," under the petitioners analysis, must be charged to the account of God, or



the Fates, or perhaps decadent American Society...anyone but the pitiable criminal.

The people of the State of Maryland, through their legislature have decided otherwise." While there are many policy reasons supporting Maryland's position that the true effects of the crime upon the victim and the victim's family are relevant to sentencing in all violent offenses, this court should be mindful that the soundness of the policy is not the ultimate question for the court to decide. Rather, the court



must decide whether Maryland Legislature has the authority to set such policy.

The arguments raised by the petitioner and the Amicus NAACP on this score appear to be twofold.<sup>5</sup>

First by, the information contained in the victim impact statement in this case, impact on the Bronstein family placed, in one fashion or another, improper pressure on the sentencing authority. This argument was raised several years ago to the President's Task Force on Victims of Crime. Their response:<sup>6</sup>

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5. We discount entirely the NAACP contention that allowing victim impact evidence would require courts to hear similar evidence

The argument is that participation by victims at sentencing will place improper pressure on judges. The duty of a judge is to dispense justice, and the passing of judgment is a difficult task. The difficulty of the task should not be relieved, however, by discharging it unfairly. Hearing from the defendant and his family and looking into the faces of his children while passing sentence is not easy, but no one could responsibly suggest that the defendant be denied his right to be heard or suffer a sentence imposed in secret in order to spare the judge. The victim, no less than the defendant, has a real and personal interest in seeing the imposition of a just penalty. The goal of victim participation is not to pressure justice, but to aid in its attainment. The judge cannot take a balanced view if his information is acquired from only one side. The prosecutor can begin to present the other side, but he was not personally affected by

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from the defendant as mitigation.

Courts are already required to hear such information from the defendant, and in

the crime or its aftermath, and may not be fully aware of the price the victim has paid. It is as unfair to require that the victim depend solely on the intercession of the prosecutor as it would be to require that the defendant rely solely on his counsel.

Victim impact evidence, then, increases the justness of sentences, rather than rendering them unfair. Victim impact evidence would diminish the possibility of an arbitrary or freakish imposition of the death penalty by providing high quality, reliable and relevant information upon which to base a rational judgment.

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fact, hear volumes of character and family testimony in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 686 (1978).



Secondly the NAACP asserts, without evidence, that the victim impact statements invite juries to impose sentences of death for impermissible reasons. A cursory look at statistics indicates that 69% of violent crime victims are non-white. Assuming a similar distribution of victims reach the sentencing phase of trial, victim impact evidence would allow those traditionally ignored by government to participate in a fashion heretofore not possible. It is simply a callous speculative misperception that the statements of

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6. President's Task Force on Victims of Crime, Final Report, p.78 (1982)

poor or minorities will be any less eloquent or any less well received than any other victims statement. Consider one of the greatest leaders and law-givers of all time: Moses, the stutterer.<sup>7</sup>

NAACP accuses juries of determining social worth by factors such as education, class, wealth, race, and religion. This remark is nothing less than a cruel, unsubstantiated insult. Certainly such an argument fails to carry the petitioners burden of establishing the unconstitutionality of the statute.

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7. Exodus, 4:10

Applying these principles to the present case, we find some information (such as the Bronstein's son's statement that his parents were "butchered like animals") that invoke emotion, but not one iota of information contained within the statement should be held impermissible.

The reasoning of the Supreme Court of California supplies us with a cold bucket of common sense with which to drown the notion that sentences must be based on the mere facts of the crime itself. <sup>8</sup>

Although appeals to the sympathy of passions of the jury are inappropriate at the guilt

---

8. People v. Haskett, 30 Cal.3d 841, 863-64 (1982).



phase (citation omitted), at the penalty phase, the jury decides a question the resolution of which turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death. It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience. [The trial court] should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction.

It is important to point out that states have their own bodies of evidentiary law. While the issue of relevance must be explored in the present case, it would be most re-

grettable if the court set the precedent of substituting its judgment for that of the state courts on a matter which is evidentiary in nature. This problem could easily be avoided by ruling generally that the use of victim impact evidence fails to violate the Constitutional rights of the defendant, and that the state courts are free to judge the relevance of particular information.

### Conclusion

"A society that loses its capacity for moral outrage is doomed." The unknown author of this statement unwittingly paraphrased this Court in its recognition that moral outrage is one of the legitimate functions of capital punishment. Victim impact evidence aids sentencing authorities immeasurably in determining what sentence is appropriate to reflect society's moral outrage over such vile acts as the petitioners' murder of Mr. and Mrs. Bronstein for these reasons, and the reasons stated above, the court should affirm the decision of the Maryland Court of Appeals.



Respectfully Submitted,

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Russell P. Butler

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Re: Booth v. Maryland  
No. 86-5020, October Term, 1986  
United States Supreme Court

Dear Mr. Butler:

I hereby consent on behalf of the State of Maryland to your  
filing of an amicus curiae brief in the above-captioned case.

-Very truly yours,

*Deborah K. Chasanow*

Deborah K. Chasanow,  
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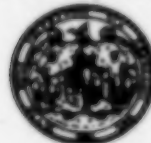
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CC: George E. Burns, Jr.,  
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STATE OF MARYLAND



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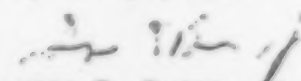
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RE: Booth v. Maryland  
No. 86-20  
Supreme Court of the United States

Dear Mr. Butler:

We agree that you may file a brief amicus curiae in  
the above case.

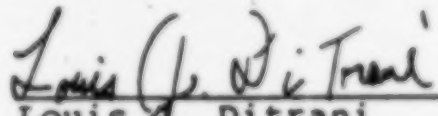
Very truly yours,

  
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GEB/lv

CERTIFICATE OF SERVICE

I hereby certify that on this 29th Day of January, 1987, that copies of this Amicus Curiae brief were sent by regular mail to the parties at their respective place of business.

  
Louis J. Ditrani

Russell P. Butler

Of Counsel  
Kurt W. Wolfgang

**MOTION**



**MOTION FILED**  
**FEB 18 1987**

No. 86-5020

**IN THE**  
**SUPREME COURT OF THE UNITED STATES**  
October Term, 1986

**JOHN BOOTH,**  
*Petitioner,*

vs.

**STATE OF MARYLAND,**  
*Respondent.*

---

**ON WRIT OF CERTIORARI TO THE**  
**COURT OF APPEALS OF MARYLAND**

---

**MOTION FOR CONTINUANCE OF**  
**THE SUNNY VON BULOW NATIONAL VICTIM ADVOCACY**  
**CENTER, INC., THE NATIONAL ORGANIZATION FOR**  
**VICTIM ASSISTANCE, INC., AND THE LEGAL**  
**FOUNDATION OF AMERICA, INC.**

---

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---

### MOTION FOR CONTINUANCE

Comes now David T. Austern on behalf of a coalition of victims' rights organizations formed for the purpose of authoring this Brief Amicus Curiae in support of Respondent to request this Honorable Court to permit the late filing of said Brief, and for cause states as follows:

1. That counsel for Petitioner has consented to both the initial and to the late filing of the brief.

2. That counsel for Respondent has consented to both the initial and to the late filing of the brief.

3. That the brief of an Amicus Curiae supporting the Respondent should be filed within the time required for the filing of the Respondent's brief, which in this case

was January 26, 1987.

4. That undersigned counsel and associates completed the brief on January 20, 1987, and the brief was typeset on January 21, 1987.

5. That the brief was sent to the printers on January 21, 1987.

6. That Washington, D.C. suffered a severe snow storm on the evening of January 21 and the morning of January 22, 1987, and the printing personnel were unable to get to work.

7. That on January 23, 1987, some of the printing personnel, by use of four-wheel drive vehicles, came to work, but were unable to complete the printing task until the afternoon of January 26, 1987 by which time the Court had closed.

8. That on January 27, 1987, Lyle Press of this office was told by a Deputy Clerk of this Court that



Counsel would be unable to file the brief because (a) the party he was supporting had already filed its brief, and (b) as counsel for Amici, he had no standing before the Court to seek an extension of time in which to file the brief.

9. That I learned thereafter that counsel for Respondent, Val Cloutier, had been granted permission to submit Respondent's brief on Tuesday, January 27, 1987, and that Ms. Cloutier had in fact telephoned the Court clerk twice to make clear that the effect of the same snow storm would keep her from timely filing.

10. That if I had known an extra day had been given to Respondent, I would have filed this Amicus brief on January 27, 1987.

12. That the Consitutional validity of victim impact legislation

concerns an issue of first impression of this nation, and that the interests of fairness and justice will be best served by granting this motion for continuance because such approval will preserve for victims of crime the unique opportunity which this case provides: to have the collective wisdom of this Honorable Court focus upon issues which are to them of vital importance.

WHEREFORE, the Amici pray:

1. For a continuance to allow the filing of an Amicus Curiae Brief in the above captioned case.
2. For such other and further relief as this Honorable Court deems just and proper.

Respectfully submitted,

David T. Austern

David T. Austern

Counsel For:

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## PROOF OF SERVICE

I am a citizen of the United States and a resident of the city of Kensington, Montgomery County, Maryland; I am over eighteen years of age and not a party to the within action; my business address is 1050 31st Street, N.W., Washington. On this date, February 19, 1987, I served the Motion for Continuance of the Sunny von Bulow National Victim Advocacy Center, Inc., the National Association for Victims Assistance, Inc., and the Legal Foundation of America, Inc. as Amici Curiae in support of Respondent in re: John Booth v. State of Maryland in the United States Supreme Court, No. 86-5020 on the persons interested in said action by placing three (3) true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Georgetown, Washington, D.C., marked as follows:

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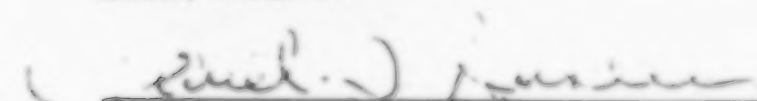
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All parties required to be served have been served.

I certify or declare under penalty of perjury that foregoing is true and correct. Executed on February 19, 1987 at Washington, D.C.



David T. Austern

**AMICUS CURIAE**

**BRIEF**



(1)

No. 86-5020

**IN THE  
SUPREME COURT OF THE UNITED STATES**  
October Term, 1986

**JOHN BOOTH,**  
*Petitioner,*

vs.

**STATE OF MARYLAND,**  
*Respondent.*

---

**ON WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF MARYLAND**

---

**BRIEF, AMICUS CURIAE, OF  
THE SUNNY VON BULOW NATIONAL VICTIM ADVOCACY  
CENTER, INC., THE NATIONAL ORGANIZATION FOR  
VICTIM ASSISTANCE, INC., AND THE LEGAL  
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IN SUPPORT OF RESPONDENT**

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No. 86-5020

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1986

JOHN BOOTH,  
*Petitioner,*

vs.

STATE OF MARYLAND,  
*Respondent.*

---

ON WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF MARYLAND

---

BRIEF, *AMICUS CURIAE*, OF  
THE SUNNY VON BULOW NATIONAL VICTIM ADVOCACY  
CENTER, INC., THE NATIONAL ORGANIZATION FOR  
VICTIM ASSISTANCE, INC., AND THE LEGAL  
FOUNDATION OF AMERICA, INC.

---

1. *Identity and Interest of Amici Curiae:* THE SUNNY VON BULOW NATIONAL VICTIM ADVOCACY CENTER, INC. is a national, not-for-profit organization, the purposes of which are to promote responsiveness of the judicial system to the rights and needs of the victims of violent crime and to implement programs to heighten America's consciousness concerning the plight of victims.

THE NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, founded in 1975, is a national nonprofit membership organization dedicated to improving the rights and services for victims of crime through national advocacy, victim counseling, technical assistance, training and membership support.

THE LEGAL FOUNDATION OF AMERICA is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a national criminal justice system in which adjudications of guilt are reliable, rather than haphazard.

2. *Desirability of a Brief Amici Curiae*: The instant case is one in which the interests of victims of crime are directly involved. *Amici* represents two national victim advocacy organizations in the private sector, and a national organization concerned with constitutional issues in criminal law.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues, and Avoidance of Duplication*: In this brief, *Amici* will discuss national, policy-related issues relating to the impact of this Court's decision in the instant case. Counsel for *Amici* have consulted with Counsel for Petitioner in an effort to avoid unnecessary duplication and believe that their policy arguments will present issues that are not otherwise raise.

4. *Consent of the Parties*: Counsel for Petitioner and Counsel for Respondent have consented to this filing. Letters to this effect have been filed with the Clerk of the Court.

## SUMMARY OF ARGUMENT

- I. THE SOVEREIGN STATES OF THIS NATION HAVE A FUNDAMENTAL DUTY TO [VINDICATE] THE INTERESTS OF VICTIMS OF CRIME.
- II. VICTIM IMPACT LEGISLATION SUCH AS THE ONE BEFORE THIS COURT IS NECESSARY TO FURTHER THE COMPELLING STATE INTEREST IN EFFECTIVE CRIME CONTROL BECAUSE IT ENCOURAGES VICTIM PARTICIPATION IN CRIMINAL JUSTICE.
- III. MARYLAND'S STATUTE REQUIRING VICTIM IMPACT STATEMENTS AT THE SENTENCING PHASE OF CAPITAL CRIMES CASES IS NARROWLY TAILORED BY EXISTING CONSTITUTIONAL SAFEGUARDS ESTABLISHED BY THIS COURT.
- IV. MARYLAND'S LEGISLATION REQUIRING VICTIM IMPACT STATEMENTS AT SENTENCING SURVIVES STRICT SCRUTINY BECAUSE THE PUBLIC GOOD ACHIEVED OUTWEIGHS THE PRIVATE BURDEN.
- V. PUBLIC PERCEPTION OF THE EFFECTIVENESS OF OUR CRIMINAL JUSTICE SYSTEM, AS A POLICY ISSUE, MANDATES AFFIRMANCE OF THE DECISION OF THE MARYLAND COURT OF APPEALS.
- VI. A RULE WHICH PERMITS VICTIM IMPACT STATEMENTS IN SOME CASES BUT NOT OTHERS DENIES EQUAL PROTECTION TO SOME CRIME VICTIMS.



## INTRODUCTION

For too long, both advocates of crime victims' rights and their opponents have mischaracterized the essence of the crime victim movement. It has been erroneously viewed as the evolution of a "balance" which must necessarily be struck between defendants' rights and the rights of crime victims. For many, the attempt to strike such a balance represents nothing more than an intrusion upon, and a usurpation of, a criminal defendant's Constitutional rights. Policies and legislation which aim to benefit crime victims have consistently been subjected to Constitutional challenges. It has been said that crime victims lack "Constitutional standing" because only the accused and not the accuser has rights explicitly guaranteed within the Constitution. Often, policies furthering victims' rights have been unable to meet these Constitutional challenges head-on. The focus must be shifted in order to command the larger, clearer vision of what victims' rights legislation truly represents.

Policies and legislation favoring implementation of crime victims' rights, especially those which provide for victim representation at judicial proceedings (i.e. hearings for bail, sentencing, parole), are necessary to further the states' interest in revitalizing and protecting their systems of criminal justice. *Amici* therefore suggest that a proper analysis of the legislation at issue herein should emphasize that the goal to be served by [this] legislation is Maryland's interest in implementing and revitalizing its system of criminal justice.

This Court has previously expressed concern for victims of violent crime. Justice Powell, in his dissent in *Furman v. Georgia*, 408 U.S. 238, 413-14 (1972) stated:

It is not without interest, also, to note that, although the several concurring opinions acknowledge the heinous and atrocious character of the offenses committed by the petitioners, none of these opinions makes reference to the misery the petitioners' crimes occasioned to the victims, to the families of the victims, and to the communities where the offenses took place. The arguments for the respective petitioners, particularly the oral arguments, were similarly and curiously devoid of reference to the victims . . . . Nevertheless, these cases are here because offenses to innocent victims were perpetrated. This

fact, and the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked.

Furthermore, in recognition of the important contribution of crime victims to the success of the criminal justice system, the Court stated in *Morris v. Slappy*, 461 U.S. 1,14 (1983),

[I]n the administration of criminal justice, the courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities.

*Amici* suggest that legislation which addresses concerns for crime victims encourages them to report violations and to cooperate with the criminal justice system, which will benefit the public in general.

## ARGUMENT

### 1. THE SOVEREIGN STATES OF THIS NATION HAVE A FUNDAMENTAL DUTY TO [VINDICATE] THE INTERESTS OF VICTIMS OF CRIME.

The police power imposes on the state the duty to protect the lives of its residents. 16A Am. Jur. 2d *Constitutional Law* §363 (1979). The police power is founded on the duty of the state to protect its people and to provide for their safety. It is the foundation upon which our social system rests. 16A C.J.S. *Constitutional Law* §433 (1984).

As originally conceived, our criminal law was designed to accomplish a very limited but necessary function. That purpose was, quite simply, to protect citizens who chose to exercise their freedom and liberty within the constraints imposed by law, from citizens who chose not to. The need to secure the safety, liberty and property of law-abiding citizens has always been one of the primary justifications for the very existence of government. This principle was averred in the Declaration of Independence as the creators' endowment of the inalienable right to life, liberty and the pursuit of happiness." It was carried into the preamble of the United States Constitution by a statement of purpose to "establish justice, insure domestic tranquility, and promote the general welfare."

It has long been recognized by the United States Supreme Court that government "owes a duty to the people . . . to maintain peace and order and to assure the just enforcement of the law." The right of personal security from criminal aggression is an inherent and inalienable right. It seems clear that victims, both actual and potential, are central to the criminal justice system. It may be that protection of the lives, liberty and property of the citizenry in a free society is but one of the basic purposes of government. However, beyond question, it is the primary purpose which justifies the existence of a criminal justice system. *Forgotten Victims: An Advocate's Anthology*, p. vi, (1977).

Violent crime is on the increase. The numbers are shocking. In large urban areas violent crime strikes one in thirty-five people each year. Every twenty-three minutes someone is murdered. Every six minutes a woman is raped. As this statement is read, two people in this country will be shot, stabbed, or seriously beaten. In 1984, there were 5,954,000 crimes of violence reported nationwide; yet, because over fifty percent of violent crime goes unreported, these figures must be doubled to express the full magnitude of the problem. *President's Task Force on Victims of Crime, Final Report*, (1982).

Apprehensions of persons committing crimes have fallen faster than the crime rate has increased. Convictions have also fallen. Punishments for persons committing serious crimes have become more lenient. Plea bargaining, rather than trial by jury, has become the norm in American criminal court cases. The cost of operating the criminal justice system has increased to the point that the public is resisting further expenditures. Hudson, *Crime Victims and the Criminal Justice System*, 11 *Pepperdine L. Rev.* 23, 27 (1984).

Often, victims are the sole witnesses to the crime and are therefore indispensable to successful prosecutions and convictions. But, as noted above, an estimated one-half of all crimes are not reported. The failure of crime victims to report crimes or actively cooperate with police and prosecutors is an alarming trend. Congress has declared that "without the cooperation of crime victims the criminal justice system would cease to function; yet with few exceptions these individuals are either ignored by the system or simply used as tools to identify and punish offenders." Historical note. For many victims, this encounter with the system proves to be too much and they vow never to become involved with the system again. Victims of crime are refusing to cooperate because they are revictimized by the system. "They have become a cog in someone else's wheel." Rowland, *Victims of Violent Crime*, (1982). Therefore, in order for states to reestablish public confidence in the viability of the criminal justice system, legislation which promotes victim cooperation is absolutely essential. Rung & Hughes, *Appeal on Behalf of Victims of Violent Crime*, (1986).

## II. VICTIM IMPACT LEGISLATION SUCH AS THE ONE BEFORE THIS COURT IS NECESSARY TO FURTHER THE COMPELLING STATE INTEREST IN EFFECTIVE CRIME CONTROL BECAUSE IT ENCOURAGES VICTIM PARTICIPATION IN CRIMINAL JUSTICE.

Enhancement of the rights and privileges of crime victims will encourage victim cooperation within the criminal justice system. Victims' status and satisfaction with the judicial process may be improved by instituting reforms which expand their involvement and recognize that crime involves more than the state and the defendant. Kelly, *Victims' Perceptions of Criminal Justice*, 11 *Pepperdine L. Rev.* 15, 20-21 (1984). Victims who participate are more likely to follow through in the court process and to be more effective witnesses. Newton, *Journal of Legislation*, 396 (1983).

There are four basic recourses open to crime victims today: some form of insurance, a civil suit brought by the victim, restitution paid by the criminal as a requirement of the state, and compensation from public funds. Victims are most often heard to complain that the system does not care for their feelings about what happened to them. Bard & Sangrey, *The Crime Victims' Book*, 129 (1979). Victim input into the decision-making process is often limited by law and practice in the criminal justice system. Zeigenhagen, *Victims of Crime and Social Control*, ix (1977). Victims wish to be informed of deliberations, included in case developments, and offered an opportunity to participate in determining what happens to their assailants. Kelly, *supra*.

It is critical that at some point in the judicial process, victims be given an opportunity to be heard. Establishing rights of victims to participate will help reduce their sense of disorientation and will demonstrate proper respect for victims' rights. Victims are more interested in the sentencing process than in any other aspect of the proceedings against the offender. Barlow, *Crime and Violence*. The dispositional stage of the court process is critical to their sense of involvement in the process of justice; and even where victims' views do not prevail, there is value in having had one's "day in court." Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 *Pepperdine L. Rev.* 117, 172 (1984). The availability of monetary compensation may ease crime victims' financial burdens but it falls woefully short of true vindication. Money cannot assuage deep pain and loss. The therapeutic "purge" of in-court confrontation with the person who caused the victimization, and having the opportunity to tell the victims' side of the story, is meaningful.



Victim impact statements communicate the true effect of the crime upon victims or survivors. Presenting the impact statements at sentencing is appropriate for two reasons: 1) this phase is meaningful to victims, and 2) the rights of defendants are minimally affected because prior to sentencing rigid rules of evidence and procedure have been strictly adhered to. After a statutorily required conviction, impact statements can safely be introduced along with other information before the sentencing authority. (See, (III, *infra*).

Maryland's victim impact legislation is necessary to further effective crime control because it provides victims with a meaningful opportunity to be heard and because it replaces the instinct for private retribution with a willingness to cooperate with the criminal justice system. The ultimate goal served is renewed public confidence in state government fulfilling its duty to protect its people.

### III. MARYLAND'S STATUTE REQUIRING VICTIM IMPACT STATEMENTS AT THE SENTENCING PHASE OF CAPITAL CRIMES CASES IS NARROWLY TAILORED BY EXISTING CONSTITUTIONAL SAFEGUARDS ESTABLISHED BY THIS COURT.

In *Williams v. New York*, 337 U.S. 241, 246-47 (1949), this Court held that due process does not require that information considered by the judge prior to sentencing meet the same high procedural standards as evidence introduced at trial. A sentencing judge must be informed of many things which do not always develop at trial, and should take into consideration all possible sources of information. Ten years later in *Williams v. Oklahoma*, 358 U.S. 576 (1959), this Court, citing *Williams v. New York*, declared that once the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from examination and cross-examination of witnesses in open court, and may, consistent with the due process clause of the Fourteenth Amendment, consider other responsible information relative to the circumstances of the crime and to the convicted person's life and characteristics.

It is the province of state legislatures to define crime and to prescribe its punishment. 22 C.J.S., *Criminal Law* §11 (1961) In exercising this prerogative, Maryland's legislature has expanded the scope of punishable crime to include the impact of the crime on victims and survivors. As the Maryland Court of Appeals stated, courts had heretofore been construing the circumstances of the crime too narrowly. *Booth v. State*, 306 Md.

172, 507 A.2d 1098 (1986). By statute, the sentencer must now consider victim impact as part of "the circumstances surrounding the crime."

Implicit in the statutory requirement is a legislative determination that in serious criminal cases in Maryland an important and relevant consideration at sentencing is the impact which a victim or his family suffers as a result of criminal conduct. *Respondent's Answer to Petition for Review*, at 11.

Pursuant to the *Williams* cases, *supra*, this information may be introduced prior to sentencing even though it is not given under oath nor is it subject to cross-examination; the Maryland Legislature believed that this information was relevant and important to the sentencing process in arriving at an enlightened and just sentence.

Prior to committing aggravated homicide in Maryland, persons know that if they should be found guilty in the first phase of a bifurcated trial, they will face the victim impact statement during the pre-sentencing hearing, and that this information will be among the relevant factors considered in the imposition of sentence. Criminal defendants should not now be heard to object that they have been treated unfairly because an articulate victim has come forward.<sup>1</sup>

Victim impact statements have been challenged as injecting arbitrariness into the sentencing process. When addressing similar challenges in the past, this Court declared that criminal defendants were protected against arbitrary imposition of sentence when certain narrowing functions had been achieved. *Gregg v. Georgia*, 428 U.S. 153 (1976). Maryland's capital punishment legislation conforms to these narrowing guidelines, and through procedural safeguards the defendant is afforded ample protection that the victim impact statement will not be an arbitrary nor prejudicially irrelevant factor in his sentencing. First, prior to the introduction of the statement to the jury, the defendant is given an opportunity to review and voice objections to the content, satisfying the holdings of *Gardner v. Florida*, 430 U.S. 349 (1977), and *Profitt v. Florida*, 428 U.S. 242 (1976). The judge has broad discretion to screen out all or portions of the statement if he deems it improper. Second, the defendant has the opportunity to rebut the statement during allocution. Third, the contents of the impact statement are preserved as part of the record for automatic appellate review, as was the situation in the instant case. There, the Maryland Court was directed to review the record to evaluate it for anything inflammatory, prejudicial, or otherwise

<sup>1</sup> Could the Maryland Legislature have intended that this provision pose a deterrent—in that a person contemplating the commission of an aggravated homicide might hesitate out of fear of the possible existence of eloquent survivors?

arbitrary. Fourth, the sentencing body is bound to find the existence of one or more statutorily aggravating circumstances which outweigh all offered evidence of mitigating circumstances before it may impose the sentence of capital punishment. For these reasons, as well as this Court's rationales in *Barclay v. Florida*, 463 U.S. 939 (1983) and *Zant v. Stephens*, 462 U.S. 862 (1983), even if the victim impact statement does contain irrelevant material, the sentence may stand. As stated in *Zant*, "The effect is ordinarily to diminish the probative value of one of literally countless factors that the jury considered." *Zant* at 901. The in-place procedural safeguards ensure that victim impact statements do not result in sentences being imposed arbitrarily.

#### **IV. MARYLAND'S LEGISLATION REQUIRING VICTIM IMPACT STATEMENTS AT SENTENCING SURVIVES STRICT SCRUTINY BECAUSE THE PUBLIC GOOD ACHIEVED OUTWEIGHS THE PRIVATE BURDEN.**

In applying the test of constitutional validity, the presumption is in favor of the reasonableness and validity of the law so that unconstitutionality must clearly be shown; to justify interference by the courts, excessive and oppressive abuse of power must be shown. 16A C.J.S., §442, *Constitutional Law* (1984). The purpose to be served by Maryland's legislation is compelling. The use of victim impact statements during sentencing is the means chosen to implement this goal. So long as this means is reasonable, the legislation should stand. Determination of the reasonableness requires balancing the effect on private interests with the public good to be achieved. If the public benefit outweighs the interference with private rights, reasonableness is indicated. 16A C.J.S. §442, *Constitutional Law* (1984).

It is *Amici's* contention that because the legislation in question has adhered to the procedures established by this Court, any interference with defendants' constitutional rights is minimal, while the scales tip heavily in favor of the compelling public interest served.

#### **V. PUBLIC PERCEPTION OF THE EFFECTIVENESS OF OUR CRIMINAL JUSTICE SYSTEM, AS A POLICY ISSUE, MANDATES AFFIRMANCE OF THE DECISION OF THE MARYLAND COURT OF APPEALS.**

A criminal justice system can be effective only if it promotes the willingness of crime victims to report crimes and to cooperate with law enforcement authorities. Without such reporting and cooperation, a criminal justice

system will collapse of its own weight, for few crimes are committed in the presence of law enforcement officers so that the officers can take action on their own initiative. There must exist a "partnership" between crime victims and the authorities.

This, in turn, depends largely on the public's perception of the system: whether it appears to work *for* the victims, or whether it appears to have a single-minded concern for the criminal defendant.

If this public perception of the system is measured by the willingness of victims to report crimes committed against them, the numbers are not particularly encouraging. The latest report from the Bureau of Justice Statistics, United States Department of Justice (October, 1986) states, with regard to reported crime:

In 1985, thirty-six percent of all [National Crime Survey] crimes were reported to the police, a rate of reporting that has remained basically unchanged throughout the 1980's [citations omitted]. About half (forty-eight percent) of all violent crimes, two-fifths (thirty-nine percent) of all household crimes, and one-fourth (twenty-seven percent) of all crimes of personal theft were reported.

Steven R. Schlessinger, Director; Report: *Criminal Victimization 1985*, Bureau of Justice Statistics, United States Department of Justice, October, 1986, at 2. See also, Caroline Wolf Harlow, Report, *Reporting Crime to the Police*, Bureau of Justice Statistics, United States Department of Justice, December, 1985.

On the other hand, as noted above in this brief, in the past ten to fifteen years tremendous strides have been made within our criminal justice system to recognize and vindicate the rights of crime victims: victim compensation, restitution, protection of victims and witnesses from intimidation and harassment, and, for purposes of the instant case, victim impact statements.

The current emphasis on the rights of crime victims has undoubtedly enhanced, for the better, victims' perceptions of the criminal justice system, which will lead to a desirable increase in crime reporting and cooperation with the authorities. As experts in the field have noted:

Societal changes having some approximate correspondence in law have been noted previously by many theorists and commentators, but the victim's role has received much attention only recently. Noting the lack of victim participation today perhaps contributed to the belief that victims are not a persisting component of law or social control and, therefore, do not require special descriptive effort. If this assumption exists, there is good reason to believe that it is not well founded, as control functions persist even if their performance is claimed by the state. Generally, individual victims serve as the justification for social action against the offender although there are some instances of normative deviation in which social groups do not justify their corrective



action by becoming victim surrogates, for example, in cases of treason. Individual victims also serve as detectors of normative deviation along with whatever other persons may observe its occurrence, but individual victims differ from observers in that sustaining the impact of deviation generates a strong incentive to respond in some manner, for example, to balance wrongs by inflicting harm on the offender or to eliminate wrongs by reasserting control and enjoyment of one's status through remediation. Although many options to normative deviation exist for the individual victim, having victim status assumed by social groups is advantageous, because the mobilization of social resources on behalf of the victim increases the probability that the offender will acquiesce to the victim's wishes. The process by which social groups become victim surrogates assures the selection of social responses for perpetuation of group norms and the correction of deviant behavior. This process is elementary for the performance of social control.

Schneider, Burcart & Wilson, "The Role of Attitudes in the Decision to Report Crimes to the Police," in *Victims, Crime and Society Control*, ed. Eduard A. Ziegenhausen (New York's Praeger 1977) at 68.

Other authorities and commentators have spoken to this topic; see, e.g., Pauley, "The Emerging Victim Factor" in the Supreme Court's Criminal Jurisprudence: Should Victims' Interests Ever Prevent a Court from Overturning a Conviction and Ordering a Retrial?, 61 Ind. L.J. 149 (1986); Miner, *Forum, Victims and Witnesses: New Concerns in the Criminal Justice System*, 30 N.Y. L. Sch. L. Rev. 757 (1985); O'Neill, *The Good, the Bad and the Burger Court: Victims' Rights and a New Model of Criminal Review*, 75 J. Crim. L. & Criminology 363 (1984); *Final Report: The President's Task Force on Victims of Crime*, The White House, Washington, D.C. (1982).

*Amici* suggest that this Court's decision in the instant case will have a major impact on the public's perception of our criminal justice system. The case provides the Court's first occasion to rule on victim impact statements, which have become a principal part of the victims' movement, endorsed through legislation, by the Federal Government and a majority of the Several States. (See, preceding sections of this brief.)

Reduced to its basic terms, the issue is relatively simple. Defendant, who was convicted of the remorseless murder of two elderly people, was allowed to "allocute" to the jury, in the penalty phase of his trial, free of taking an oath and free of any fear of cross-examination; the victims' survivors were allowed to "allocute" in the form of a victim impact statement, submitted in writing, to the jury.

This strikes a proper balance between criminals' rights and victims' rights. Indeed, the advantage was on the side of the defendant who had the opportunity to say anything he wanted to in his own behalf without fear of being examined for what he said. In these circumstances, the victim impact statement should be allowed to stand. Such a ruling by the Court will heighten the public perception that the criminal justice system considers

the rights of victims, with the concomitant benefits — reporting crime and cooperation with the authorities — discussed above.

An adverse ruling will add to the public's disillusionment with the system, while adding no substantive Constitutionally-based increment to the rights of the accused. For these policy reasons, the decision of the Maryland Court of Appeals, in the instant case, should be affirmed.

## VI. A RULE WHICH PERMITS VICTIM IMPACT STATEMENTS IN SOME CASES BUT NOT OTHERS DENIES EQUAL PROTECTION TO SOME CRIME VICTIMS.

In his brief before this Court, petitioner argues that the use of a victim impact statement during the penalty phase of a capital trial injects impermissible considerations into the sanction consideration and decision. Implicit in this argument — although not specifically stated — is that victim impact statements, while permissible in some cases, are impermissible in those cases in which the death penalty is a sentencing alternative. *Amici* contend that were this court to adopt petitioner's argument, some victims of crime would have their impact statements come before the court, and some would not. This latter category of victims would be denied the opportunity to address the court to explain the impact of the crime upon them; they would be denied the opportunity to have someone else bring the impact to the court's attention.

Thus, this Court's decision would establish classes of victims—those with impact statements and those without. *Amici* submit that such a decision could result in impermissible classifications of victims and would constitute a denial of equal protection.

It should be axiomatic that everyone has a constitutional "right" not to be a victim of crime. A violation of law is an offense against society as well as an invasion of the personal rights of the victim. Perhaps that is the reason a majority of this Court has held that "in the administration of criminal justice, courts may not ignore the concerns of victims." *Morris v. Slappy*, *supra*. Over one hundred years ago, Chief Justice Waite, speaking for a unanimous Court, observed that: "Allegiance and protection are . . . reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance." *Minor v. Happersett*, 88 U.S. 162 (1875). As noted in the first section of this brief, the fair treatment of crime victims is an integral part of the criminal justice function.

Criminal offenses produce in crime victims a perceived need and desire for retaliation against the offender. See, Toby, *Is Punishment Necessary?*, 55 J. Crim. L., Criminology & Police Sci. 332 (1964); Halleck, *Vengeance and Victimization*, 5 Victimology 99 (1980). In fact, the existence of a need and desire for retaliation and punishment of the offender on the part of



the crime victim has been recognized as a necessary component for the maintenance of respect for law and as a means to suppress acts of private vengeance. See, W. LaFave & A. Scott, *The Criminal Law II* (1972); *Gregg v. Georgia*, 428 U.S. 153, 183-184, n. 30 (1976). While there is almost no research dealing with acts of private vengeance, Wolfgang, *Victim Precipitated Criminal Homicide*, 48 *J. Crim. & Criminology* 1-11 (1957), such vengeance may be attempted if there is little confidence the criminal justice system is sensitive to crime victims. That sensitivity is best demonstrated by giving the victim or the victim's survivors a "voice" during the sentencing process.

Then, too, equal protection considerations apply to the scenario petitioner encourages: the convicted offender may speak (sworn or unsworn) during the penalty phase. The victim may not speak; nor may anything about the victim (or the victim's survivors) be mentioned. Stated differently, as petitioner views it, crime victims are neither equal nor protected.

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), Chief Justice Marshall noted that "[t]he very essence of civil liberty certainly insists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection . . . ." When the law fails to apply criminal procedure principles in an equal manner, this Court has been quick to strike down the discrimination. *Griffin v. Illinois*, 351 U.S. 12 (1956). Clearly, discrimination should not be established by a decision of this Court. To permit victim impact statements in some cases and for some crime victims, but not in other cases for other crime victims discriminates with respect to such victims.

### CONCLUSION

For the foregoing reasons, *Amici* support the Attorney General's position that the use of victim impact statements at sentencing proceedings is constitutional.

Respectfully submitted,

By: \_\_\_\_\_  
Frank Gamble Carrington, Jr., Esq.

David Crump, Esq.  
Sandra Allison, Esq.  
Judith A. Rowland, Esq.  
Constance L. Belfiore, Esq.

### PROOF OF SERVICE

I am a citizen of the United States and a resident of the city of Gaithersburg, Montgomery County, Maryland; I am over eighteen years of age and not a party to the within action; my business address is 1050 31st Street, N.W., Washington. On this date, February 18, 1987,

I served the Brief of the Sunny von Bulow National Victim Advocacy Center, Inc., the National Association for Victims Assistance, Inc., and the Legal Foundation of America, Inc. as *Amici Curiae* in support of Respondent in re: *John Booth v. State of Maryland* in the United States Supreme Court, No. 86-5020 on the persons interested in said action by placing three (3) true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Georgetown, Washington, D.C., marked as follows:

Valerie N. Cloutier, Esq., Assistant Attorney General, Deputy, Criminal Appeals Division, Munsey Building, Calvert and Fayette Streets, Baltimore, Maryland 21202-1909

George E. Burns, Jr., Esq., Assistant Public Defender, 312 North Eutaw Street, Baltimore, Maryland 21201;

and one (1) copy on each of the following:

Julius L. Chambers, Esq., 99 Hudson Street, New York, New York, 10013;

Anthony G. Amsterdam, New York University School of Law, 40 Washington Square South, New York, New York 10012.

Frank Gamble Carrington, Jr., Esq., 4530 Ocean Front Ave., Virginia Beach, VA 23451.

David Crump, Esq., Legal Foundation of America, South Texas College of Law, Houston, TX 77002;

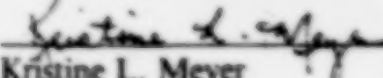
Sandra Allison Esq., Sunny von Bulow National Victim Advocacy Center, Inc., 307 W. 7th St., #1001, Fort Worth, TX 76102;

Judith A. Rowland, Esq., Executive Director, California Center on Victimology, Counsel for National Organization for Victim Assistance, 204 Broadway, San Diego, CA 92102;

Constance L. Belfiore, Esq., Of Counsel, National Organization for Victim Assistance, 4317 Sheridan St., University Park, MD 20782

All parties required to be served have been served.

I certify or declare under penalty of perjury that foregoing is true and correct. Executed on February 18, 1987 at Washington, D.C.

  
Kristine L. Meyer

**MOTION**

MOTION FILED

FEB 5 1987

No. 86-3020

In The

**Supreme Court of the United States**

FOR ARGUMENT

October Term, 1986

JOHN BOOTH,

*Petitioner,*

VS.

STATE OF MARYLAND,

*Respondent.*

*On Writ of Certiorari to the Court of Appeals of Maryland*

**MOTION FOR CONTINUANCE**

RUSSELL P. BUTLER  
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\* *Counsel of Record*

KURT W. WOLFGANG  
*Of Counsel*



IN THE SUPREME COURT OF THE  
UNITED STATES

JOHN BOOTH	:	NO: 86-5020
Petitioner	:	OCTOBER TERM,
	:	1986
V.	:	
STATE OF MARYLAND	:	
Respondent	:	

MOTION FOR CONTINUANCE

Comes now Louis J. DiTrani, and Russell P. Butler, and Kurt W. Wolfgang (of counsel), on behalf of the Stephanie Roper Foundation (SRF) and respectfully asks this Honorable Court to allow the late filing of an Amicus Curiae Brief and for cause states as follows:

1. Petitioner has in writing consented to the SRF filing an Amicus Curiae Brief (Apx. 1a).

2. Respondent has in writing consented to the SRF filing an Amicus Curiae Brief (Apx. 2a).

3. That counsel for SRF sent a letter to the Clerk of the Supreme Court requesting an extension on January 27, 1987 pursuant to Supreme Court Rule, Rule 29 which was filed with the Amicus Curiae Brief of the SRF.

4. That the brief of an an Amicus Curiae supporting the Respondent should be filed within the time required for the filing of the Respondent's brief. Supreme Court Rule, Rule 36.2.

5. That the Respondent's brief in this case was due on January 26, 1987.

6. That but for two major snowfalls in the Washington area, the Amicus Curiae Brief would have been timely filed.

7. That Amicus Curiae Brief was written and submitted to the typist on

January 21, 1987 and about one half was typed on that day.

8. That the typing was to be completed on January 22, 1987 and sent to the printers that day.

9. That no secretaries came into the office because of the two snowfalls until January 27, 1987.

10. That the typing and proofing of the Brief were completed on January 27, 1987 and sent to the printers on January 28, 1987.

11. That all counsel for the SRF are in this case Pro Bono and they have donated there time and effort to relate the position of the SRF.

12. That all reasonable efforts were made to timely file this Amicus Curiae Brief.

13. That the SRF is a non profit organization that has expended monies for the printing and delivery of the

Amicus Curiae Brief.

14. That argument is presently scheduled before this Court during the period March 23, 1987 - April 1, 1987.

15. That allowing a continuance to allow the late filing of this Amicus Curiae Brief will neither delay oral argument of this Court nor prejudice any party as all parties have previously have received copies of the Amicus Curiae Brief.

16. That the Petitioner has Amicus Curiae in support of their position.

17. That SRF Amicus Brief cites authorities that were not mentioned by either party which are persuasive to the issues before the Court and most important from the perspective of the victims of crimes.

WHEREFORE, the SRF prays:

1. For a continuance to allow the filing of an Amicus Curiae Brief in the

above captioned case.

2. For such other and further relief as this Honorable Court deem just and proper.

Respectfully submitted.

---

LOUIS J. DITRANI,

COUNSEL OF RECORD

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1a

OFFICE OF THE PUBLIC DEFENDER  
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312 N. Eutaw Street  
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December 2, 1986

Russell P. Butler, Esquire  
5210 Auth Road  
Suitland, Maryland 20746-4325

RE: Booth v. Maryland  
No. 86-20  
Supreme Court of the United States

Dear Mr. Butler:

We agree that you may file a brief amicus curiae in the above case.

Very truly yours,

s/ George E. Burns, Jr.  
George E. Burns, Jr.  
Assistant Public Defender  
Appellate Division  
333-4842

GEB/lv